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The  
Canonical and Civil Status  
of Catholic Parishes in the  
United States

BY

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# CONTENTS

	PAGE
CHAPTER I. THE HISTORICAL DEVELOPMENT OF PARISHES . . . . .	1
1. Origin of Parishes . . . . .	2
2. Characteristics of Ancient Parishes . . . . .	6
3. Vicissitudes of Church Property . . . . .	14
4. Appointment of Pastors . . . . .	19
5. Pastor and Parishioners . . . . .	22
6. Division of Parishes . . . . .	29
7. Parishes Held by Religious . . . . .	31
8. Parishes <i>in Commendam</i> . . . . .	47
9. Parishes in Canada . . . . .	48
10. Parishes in the United States . . . . .	49
CHAPTER II. THE ESTABLISHMENT OF PARISHES . . . . .	59
1. Different Kinds of Parishes . . . . .	62
2. Formalities Required for Erecting a Parish . . . . .	84
3. Corporate Rights . . . . .	98
4. American Civil Church Law . . . . .	112
5. Transfer of Church Property . . . . .	127
CHAPTER III. CHANGE OF PARISHES . . . . .	136
Section I. Union of Parishes . . . . .	137
1. Various Kinds of Union . . . . .	137
2. Competent Authority . . . . .	143
3. Reasons and Formalities Required for a Union of Parishes . . . . .	152
Section II. Division and Dismembration . . . . .	155
1. Definition . . . . .	155
2. The Competent Authority . . . . .	156

	PAGE
3. Canonical Reasons for Dividing Parishes . . . . .	158
4. Formalities Required for Dismembration . . . . .	167
5. Recourse from a Decree of Division . . . . .	178
6. Formulary for a Decree of Division . . . . .	181
Section III. Religious Benefices . . . . .	183
Rights and Duties of Religious who are Pastors . . . . .	193
Section IV. Transfer, Transformation, and Suppression of Parishes . . . . .	199
Civil Church Law . . . . .	204
CHAPTER IV. ADMINISTRATION OF PARISHES . . . . .	209
Section I. The Pastor . . . . .	209
1. Appointment . . . . .	209
2. Removal . . . . .	223
3. Functions of Pastors . . . . .	229
4. Assistant Pastors . . . . .	235
Section II. The Parishioners . . . . .	242
1. Who are Parishioners? . . . . .	242
2. Rights and Duties of Parishioners . . . . .	248
Section III. The Parish Church . . . . .	255
Art. I. The Church as a Fabric . . . . .	256
Administration of the Fabric . . . . .	257
Administration of Parish Churches . . . . .	258
Trustees . . . . .	260
The Duties of Trustees . . . . .	263
Upkeep and Repair of the Church . . . . .	266
Parish Contributions . . . . .	273
Begging . . . . .	282
Art. II. The Church Edifice . . . . .	285
1. The Building . . . . .	285
2. Dedication . . . . .	287
3. Desecration, Reconciliation, Interdict . . . . .	290
Art. III. Cemeteries . . . . .	297
Art. IV. American Civil Church Law . . . . .	305
1. Appointment and Removal of Pastors . . . . .	305
2. Functions of Pastors and their Relation to their Congregation . . . . .	310



# Contents

V

	PAGE
3. The Parishioners . . . . .	314
4. The Church Edifice . . . . .	318
5. Bells . . . . .	319
6. Pews . . . . .	320
7. Cemeteries and Burials . . . . .	320
INDEX . . . . .	327





# THE CANONICAL AND CIVIL STATUS OF CATHOLIC PARISHES IN THE UNITED STATES

## CHAPTER I

### THE HISTORICAL DEVELOPMENT OF PARISHES

The term parish is derived from the Greek *παρὰ*, *near*, and *οἶκος*, *house*. It had various meanings in early ecclesiastical literature. Sometimes *parochia* or *paroecia* signified an entire province, sometimes it was limited to a diocese in the modern sense. In the stricter acceptance it occurs in ecclesiastical documents of the fourth century, denoting a territory under the jurisdiction or authority of a *chorepiscopus* or *presbyter* stationed in the country, not in a city, for in cities the organization of parishes proceeded more slowly than in the country.<sup>1</sup>

<sup>1</sup> See Forcellini-De Vit, *Totius Latinitatis Lexicon*, Prati, 1868, Vol. IV, 509.

## 2 *Historical Development of Parishes*

The *Code*, in can. 216, § 1, appears to offer a *definition* of a parish, as we now understand it, when it says: "The territory of each diocese should be distributed into districts, and to each of these should be assigned a special church with a determined part of the flock, over which is to be placed a local pastor, who shall take the necessary care of the souls."

Here we have the three usually assigned features of a parish, namely: a fixed territory, a people belonging to a special church, and a residential priest, who goes by the name of pastor. These will be discussed later on.

### 1. *Origin of Parishes*

The Apostles and their companions preached the Word of God chiefly in the larger cities. There, too, they organized Christian communities and ordained superiors or prelates to watch over the flock. The Epistles of St. Paul testify to this mode of primitive organization. From the cities the Gospel was carried into the country (*in pagos*). Most probably the country flocks were at first attended from the neighboring

cities. It is but natural to presume that the *presbyter excurrens* would often remain among these country Christians for some length of time. Documents of the third century already mention country pastors and country churches, of which, if we may believe Eusebius,<sup>2</sup> quite a number must have existed towards the close of that century.

St. Athanasius in his second Apology gives a description of a country called Mariotis, which is indicative of the existence of rural parishes in the first half of the fourth century. The text reads: Mariotis is a country place, (*χωρα*), where there never was either a bishop or a *chorepiscopus*, but all the churches are subject to the Alexandrine bishop, in such a manner, however, that each town has its own priests.<sup>3</sup> These country parishes appear to have been far apart,—so far that some of the faithful had 1,000 *stadia* (almost 19 miles)<sup>4</sup> to church. Hence it may be concluded that these rural parishes were estab-

<sup>2</sup> *Hist. Eccl.*, VII, 11, 24; VIII, 1.

<sup>3</sup> Thomassinus, *Vetus et Nova Disciplina*, P. I, lib. II, cap. 22, n. 3.

<sup>4</sup> S. Chrys., *Homil. in Act. Apost.*, XVIII: "*coguntur mille stadia emetiri ut ad ecclesiam perveniant*,"

#### 4 *Historical Development of Parishes*

lished in the more conspicuous and larger towns of the country. The Council of Chalcedon (451) supposes the existence of such parishes,<sup>5</sup> which in the Oriental Church probably antedated this synod by at least a hundred years.

In the Western countries progress was naturally slower. Yet in St. Augustine's time there certainly were parishes established in *Africa*<sup>6</sup> and *Spain*.<sup>7</sup>

In *Gaul*, more especially in Southern Gaul, country parishes are mentioned in the beginning of the fifth century.<sup>8</sup> These parishes were far apart from one another and from the episcopal see.

This was also the case in the *Teutonic-Frankish* realms, where, besides, the feudal lords built for themselves *oratoria*, *basilicae*, and *capellae* on their extended domains. These minor houses of worship, usually built for the owners or serfs and dependents, were

<sup>5</sup> Can. 17 mentions village or country parishes (Hefele, *C.-G.*, II, 501 f.)

<sup>6</sup> S. Augustine *Epist.* 262 *ad Coelest.*

<sup>7</sup> Synod of Toledo, 400, can. 5.

<sup>8</sup> Council of Riez (439), can. 5; Council of Vaison (442), can. 3.



subject to the priest of the parish. A parish in those days sometimes comprised ten or more villages and hamlets. A decree of the Synod of Tribur, 895 A. D., permitted the establishment of a new parish only when it was at least four or five geographical miles distant from the existing parish church.<sup>9</sup> From the ninth century onward many new parishes were founded, although the synods of the period were rather conservative with regard to both division and dismembration.

In the eleventh century the larger cities witnessed a further development of the parochial system. But the episcopal cities frequently had only one parish in the canonical sense, *viz.*, the cathedral, which was assigned to a cathedral chapter. The Council of Trent insisted upon strict organization of parishes, also in cities.<sup>10</sup> This was the law until the promulgation of the Code, although, to the great detriment of religion, it was not carried into effect everywhere.

<sup>9</sup> Can. 14 (Mansi, *Coll. Conc.*, XVII and XVIII, col. 140.

<sup>10</sup> Sess. XXIV, cap. 13, *de Ref.*; cfr. v. Scherer, *Kirchenrecht*, I, 629 f.

## 6 *Historical Development of Parishes*

### 2. *Characteristics of Ancient Parishes*

The *territorial circumscription* of parishes sometimes, but not always, followed the political or civil division of a country or province. Our county may perhaps represent the ancient *pagus* and the county-seat the place where the parish church was located, at least at the time when rural parishes were still few and the number of the faithful was small. Walafrid Strabo compares the rural priests in charge of baptismal churches to the *centenarii* set over *pagi* or cantons.<sup>11</sup> However, we should be slow to generalize this assertion, as the sources do not admit of stating a general rule.<sup>12</sup>

In the ninth century a great number of oratories or chapels were changed into real parish churches. The bishop of the diocese, usually with the approval or coöperation of the temporal ruler, assigned the boundaries of every parish. Thus what we might call

<sup>11</sup> *De Ecclesiasticarum Rerum Exordiis et Incrementis*, cap. 31 (Migne, P. L., 114, 964).

<sup>12</sup> Loening, *Geschichte des Deutschen Kirchenrechts*, 1878, II, 348.

a *synodus mixta*, held in 772 under Tassilo of Bavaria, decreed that the bishop should designate clearly how many and which villages, towns, or hamlets each parish priest should govern.<sup>13</sup> Decrees of the same tenor occur in the so-called "Capitularies" of the Frankish Kings, showing that this was the general rule throughout the Middle Ages.<sup>14</sup>

How were the parishes *endowed*? At the beginning of the sixth century rural parishes possessed no property of their own, but were entirely subject to, and maintained by, the cathedral. The diocese itself was the proprietor of all revenues destined for these rural parishes.<sup>15</sup>

A step farther in the independent proprietorship of rural parishes is noticeable in a canon of the synod of Carpentras, in 527,

<sup>13</sup> Synod of Neuching, see Hefele, *C.-G.*, III, 577.

<sup>14</sup> "*Statutum est ut unaquæque ecclesia suum presbyterum habeat, ubi id fieri facultas providente episcopo permiserit*"; n. 86, *Capit. ab Anselmo Collecta* (Migne, P. L., 97, 523.) "*Ut terminum habeat unaquæque ecclesia, de quibus villis decimas recipiat*"; n. 51, *Bened. Collectio*, lib. I (Migne, 97, 710).

<sup>15</sup> Synod of Agde, 506, can. 22 = c. 32, C. 12, q. 2; First Synod of Orleans, 511, can. 15 = c. 7, C. 10, q. 1; Loening, *l. c.*, II, 634 f.

## 8 *Historical Development of Parishes*

which says: "Complaints have been made that some bishops give nothing or little of what has been donated for rural parishes to these latter. In order to obviate this inconvenience, we decree that if the cathedral church has plenty to live on, all donations or oblations made to rural churches must be reserved for these and expended on the clergy serving there and on the repairs of the church. Should the cathedral be really poor and needy, the bishop may apply to it of the donations made to rural parishes whatever is not needed for the salary of the clergy and the repairs of these rural parishes."<sup>16</sup> Those who wished to have a church on their property, therefore, had to provide it with sufficient endowment and a clergyman.<sup>17</sup> The final stage was reached when the parish priest, or the corporation itself, was considered as usufructuary of its property and immediate administrator of the same, at first indeed in a precarious way, but later on permanently. The name for the real property

<sup>16</sup> Hefele, *C.-G.*, II, 696.

<sup>17</sup> Fourth Synod of Orleans, 541, can. 33 (Hefele, *l. c.*, II, 761).

assigned to the parish clergy was *beneficium*, taken from Germanic feudal usage, and the clergyman himself was called *beneficiarius*.<sup>18</sup>

Although such a parish resembled a modern corporation, the beneficiary was subject to his bishop with regard to the administration, and without the bishop's permission could not exchange or alienate church property. Besides, he had to give an account of his administration to the bishop at the annual visit. Bishops were furthermore entitled to certain *contributions* from the parishes, sometimes to one-third, sometimes to one-fourth of the entire income. In order to understand why this tax was so high, we must remember that this became the rule when all church property was still one mass, distributed into three parts, (as in Spain) or four (as elsewhere), *viz.*, one for the bishop, one for the clergy, one for the churches, and one for the poor. When the bishop no longer provided for the churches and the clergy, and the poor were looked after by monasteries and charitable institutions, it was but natural that

<sup>18</sup> Zorell, in *A. f. K.-R.*, 1902, Vol. 82, p. 275.



they should be satisfied with a determined sum from the voluntary contributions of the parishioners. Some bishops appear to have exacted such payments rather violently, so that synods were called upon to fix the sum which the bishops were allowed to exact from their dioceses. A council of Toulouse decreed that no bishop should be allowed to demand from each pastor more than one *modius* of wheat, one *modius* of barley, one *modius* of wine, and one young pig, which should not exceed six *denarii* in value. If the bishop would rather have cash, he should be given two *solidi*.<sup>19</sup> This, as we know from reliable sources, was the amount of the *cathedraticum* in later years. But complaints of extortion never ceased.<sup>20</sup>

The *material* resources of the clergy were

<sup>19</sup> The *modius* differed in different countries and provinces, but probably it was, in dry measure, a little more than an English peck, in liquid measure, perhaps 1.92 of a gallon; some think it was the old German *Maas*, or three pints. A *denarius*, at the time of Christ, was about 17 cents; but in Charlemagne's time a *solidus* was reckoned at 12 *denarii* (equal to \$1.05; see R. Schröder, *Lehrbuch d. Deutschen Rechtsgeschichte*, 1907, p. 187).

<sup>20</sup> See cc. 1, 4, 6, C. 10, q. 3; can. 4 of the Seventh Synod of Toledo 646 (Hefele, *l. c.*, III, 88).

threefold, *scil.*, offerings, real estate, and tithes. Offerings, in the strictest sense, were the bread and wine which had to be brought to the church on Sundays,<sup>21</sup> donations, and legacies. Many are the regulations issued by various synods regarding such offerings. One was that if a man wished to make a last will in favor of a church, he should draw up a document with date and place and have it attested by three trustworthy witnesses of noble rank.<sup>22</sup> Another, that a last will made by bishops and clerics in favor of a church should be held valid even though the civil form had been partly neglected.<sup>23</sup>

The real estate of each parish church was to consist of at least one *mansus*, according to a capitular of Louis the Debonaire.<sup>24</sup> But this was the minimum. Testamentary conveyances either with a reservation of the usufruct

<sup>21</sup> Synod of Macon, 585, can. 4 (Hefele, III, 36). Milk and honey were forbidden (*ib.*).

<sup>22</sup> Synod of Dingolfing, Bavaria (772), can. 2 (Hefele, *l. c.*, III, 569).

<sup>23</sup> Synod of Paris (645), can. 10 (Hefele, *l. c.*, III, 64).

<sup>24</sup> Zorell, in *A. f. K.-R.*, 1902, Vol. 82, 275.—A *mansus* was an estate that sufficed to support the owner and two serfs. Du Cange, *s. v.* "*Mansus*."

## 12 *Historical Development of Parishes*

during the donor's lifetime, or without such a restriction, or with a certain additional condition or onus, for instance, saying the Office, or a Mass, or both, were frequent, and made the Church one of the richest owners of landed property, especially in the Frankish kingdoms.<sup>25</sup>

Another important source of church revenues were the *tithes*, which originated in the Western Church in the fifth century. The idea itself was derived from the Old Testament.<sup>26</sup> Ecclesiastical legislators and writers insisted upon its adoption in the Christian Church. A Synod of Macon (585) complains of the neglect of this precept, which it calls a divine law, binding under pain of excommunication.<sup>27</sup> A synod of Toledo (655) rules that whosoever refuses to give to the Church the tenth part of all the fruits of his

<sup>25</sup> Loening, *l. c.*, II, 653. In connection with these wills may be mentioned a rather curious enactment, *viz.*, a canon forbidding priests to say Mass for living testators in order that they might soon die; priests who ventured to do that were to be perpetually exiled and excommunicated. (Seventeenth Synod of Toledo [694], can. 5; Hefele, *l. c.* III, 323).

<sup>26</sup> Lev. 27, 30 ff.; Numb. 18, 21 ff.; Deut. 12, 6 ff.

<sup>27</sup> Can. 5 (Hefele, *l. c.*, III; 36).

oxen, sheep, or goats, should be admonished three times, and if he does not heed the admonition, be excommunicated.<sup>28</sup> Also every tenth slave was to be offered to the bishop. Those who had no slaves, but several youths, should offer, instead, one-third of a *solidus*.<sup>29</sup> The ecclesiastical writers, from St. Jerome<sup>30</sup> onward, set forth, the same theory until the Scholastics, and especially St. Thomas,<sup>31</sup> laid down more correct and sober rules with regard to tithes. Their teaching may be briefly stated as follows: In the Old Law tithes were given for the maintenance of God's ministers, according to Malachias III, 10. The law prescribing this practice is partly natural and partly judiciary. As a moral or natural law this precept never ceases, but its judiciary feature was merely a positive enactment, which like the ceremonial laws ceased under the New Dispensation. In other words,

<sup>28</sup> Can. 3 (Hefele, *l. c.*, III, 90).

<sup>29</sup> Synod of Tours, App. (Mansi, *Coll.*, IX, 808 ff.).

<sup>30</sup> *Comment. in Mal.*, c. 3; Loening, *l. c.*, II, 676 ff.; Walafrid Strabo, *De Rebus Ecclesiasticis*, cap. 27 (Migne, *P. L.*, 114, 961).

<sup>31</sup> *Summa Theol.*, IIa-IIae, q. 87, art. 1; see Ia-IIae, q. 104, art. 3.

## 14 *Historical Development of Parishes*

tithes have a claim on natural obligation only so far as they inculcate the proper support of the ministers of religion. In the New Testament tithes, as tithes, are not based either on natural or on the divine law. This should always be kept in mind by the makers of diocesan statutes.

### 3. *Vicissitudes Of Church Property*

Church property, especially when it was large and conspicuous, easily became a bone of contention between the civil and the ecclesiastical authorities, though it cannot be denied that the civil code often sanctioned and protected ecclesiastical laws and customs. The Merovingian kings did not claim the right to dispose of church property, but their empty treasuries, the suggestions of avaricious courtiers, and the clamor of an unpaid soldiery often led to violent and unjust spoliation of churches. Charles Martel was particularly guilty of such conduct towards churches and monasteries, many of which fell into the hands of laymen. Previous synods had lifted their voices against such unwarranted in-



terference, but they were unsuccessful in eradicating the evil. In more than one conciliar decree the spoliators of church property were denounced as "murderers of the poor" and the bishops were earnestly admonished to resist their encroachments.<sup>32</sup> Portions of this stolen property were restored owing to the energy of St. Boniface and the councils held during his time. But later secular laws, by various devices, dampened the religious fervor of the faithful and tried to prevent the churches from getting too rich,—which in itself was not altogether to be condemned. Thus the Codes of the Visigoths, of the Burgundians, and of the Bavarians restricted the right of owners to convey real estate to a church without having first compacted with their children or safeguarded the original estate.<sup>33</sup>

Such enactments were reasonable because they were intended and apt to preserve the

<sup>32</sup> Synod of Agde (506), can. 4; Synod of Orleans (549), can. 13 (Hefele, *l. c.*, II, 633; III, 4).

<sup>33</sup> *Lex Visigoth.*, II, 19; *Burg.*, tit. 84, cap. 1; *Bajuwar.*, tit. I, cap. 1 (Walter, *Fontes Iuris Germanici*, 1824, I, 342, 243; Loening, *l. c.*, II, 681).

## 16 *Historical Development of Parishes*

peasant's estate intact and sufficient for the maintenance of the entire household,—owner, tenants and serfs.

Neither did the Church object to the *taxation* of her landed property if the State demanded it for defraying the public expenses, as was the rule in the Frankish Kingdom.<sup>34</sup>

However, this general rule was rendered inefficacious by the so-called *privilegia immunitatis* which were issued by the kings, first to especially deserving monasteries or churches, and later to many others, including entire bishoprics. These privileges exempted their possessors from paying the public taxes and duties, and forbade the royal or imperial officers to enter the premises of such exempted corporations. The large number of such privileges caused a formulary to be set up for the issuance of such immunities,<sup>35</sup> and the synods were not slow to claim them

<sup>34</sup> Loening, *l. c.*, II, 722; the *Lex Romana Canonice Compta*, § 54, allowed the mortgaging of church property to raise money for paying the taxes; M. Conrat, *Die Lex Romana Canonice Compta*, Amsterdam, 1904, page 67.

<sup>35</sup> See *Marculf Monachi Formularium Libri Duo* (Walter, *Fontes*, III, 290 ff.).

as a right pertaining to the Church.<sup>36</sup> Hence originated what is called real immunity.

By an abuse of the secular as well as the ecclesiastical authority ecclesiastical landed property was often delivered into the hands of *laymen*, sometimes without any reason, sometimes without sufficient guarantee, sometimes merely for reasons of nepotism or favoritism. There were indeed some reasons which justified such leases, for instance, the maintenance of fugitives of war who overran the country at the beginning of the sixth century, or the grant of land under the condition that the usufruct should remain with the church corporation.

Another way of curtailing church property was this: the king simply directed the bishop or archpriest to let one of his favorites have a piece of land in the form of usufructuary possession. No rental was paid for these grants, which were called *precariae verbo regis*. Since prescription, if founded on a *titulus iustus*, could be appealed to, these

<sup>36</sup> Thus the Synod of Chalons sur Saone, 646, can. 11, complained that secular judges entered parishes and monasteries without permission of the abbot or archpriest.

## 18 *Historical Development of Parishes*

lands frequently reverted to the Church.<sup>37</sup> Emphyteutic leases or holds were sometimes granted, by which the holder was entitled to transfer the property to his heirs, or to alienate it.<sup>38</sup>

*Priests*, especially those employed in the rural districts, usually received some landed property from their bishop. Such grants were also called *precariae*, *i. e.*, made upon request or prayer. But the term had yet another meaning, *viz.*, that the property thus granted could be reclaimed at any time, and was not subject to prescription.<sup>39</sup> Later synods, however, ruled that land granted to parish priests should not be taken away from them unless they were guilty of an ecclesiastical crime, such as disobedience.<sup>40</sup> These *precariae*, because their grant implied a gracious act, later on, *i. e.*, since about the seventh century, were called *beneficia*. Hence the term *ecclesiastical benefices*.

<sup>37</sup> Loening, *l. c.* II, 289 f.; 691 f.

<sup>38</sup> Loening, *l. c.*, II, 716 ff.

<sup>39</sup> Synod of Agde (506), can. 59; Synod of Orleans (511), can. 23 (Hefele, *l. c.* II, 640, 646); see cc. 11, 12, C. 16, q. 3.

<sup>40</sup> Third Synod of Orleans (538), can. 17 (Hefele, *l. c.*, II, 755).

The beneficiary system prevailed throughout the Middle Ages and caused a parish or pastor thus endowed to be well nigh irremovable and to be looked upon as a little landlord.

#### 4. *Appointment of Pastors*

The bishop always exercised jurisdiction over the entire diocese. As long as there was no division into smaller districts, he was considered to be the pastor of the whole diocese. By the act of ordination a person was incorporated in the diocesan clergy and put on the roster (*matricula*) of the diocese. No priest was allowed to serve at a church or oratory of another diocese, unless the Ordinary for whose diocese he had been ordained, had ceded him to the other bishop.<sup>41</sup> The bishop was free to appoint to a rural church any priest who had received sacerdotal ordination. For although a synod of Tarragona (516) apparently admits a deacon to hold services one week alternately with a priest,<sup>42</sup>

<sup>41</sup> Synod of Epaon (517), can. 5 (Hefele, *l. c.*, II, 663).

<sup>42</sup> Can. 7 (Hefele, *l. c.*, II, 657).

yet the mere fact that priests and deacons are mentioned suffices to establish the rule, later generally adhered to, that only priests were allowed to function as pastors.<sup>43</sup> To prevent nepotism, some synods forbade bishops to appoint relatives or favorites to the pastoral office.<sup>44</sup>

This free collation (*collatio libera*) was exercised by the bishop over all the churches which he had founded from his own revenues. But the feudal lords, who established rural parishes and endowed them, soon claimed a share in the matter of appointments. For these churches, according to the Germanic view, were the property of the land-owner, who therefore had to be reckoned with, in the appointment of the parish priest. This led to the so-called advowson, or *iuspatronatus*. The land-owner was allowed to present a fit subject for institution or investment with the parochial office. This seemed all the more natural since bishops, too, who had founded a church in a diocese not their own,

<sup>43</sup> Synod of Doin (527), can. 12 (Hefele, *l. c.*, II, 698).

<sup>44</sup> Tenth Synod of Toledo (656), can. 3 (Hefele, *l. c.*, III, 95).



claimed the right to present a clergyman to that church.<sup>45</sup>

But this right of presentation, as admitted by the Church, was often and flagrantly abused, and developed into lay investiture, which caused the famous struggle between the Teutonic Emperors and the reforming Popes of the eleventh and twelfth centuries.

The bishops were furthermore restricted in their free appointment by the coöperation of the parishioners, who asserted a right to take part not only in the election of bishops, but also in the choice of priests. The principle pronounced by Hincmar of Rheims: "*Ab omnibus debet eligi, qui ab omnibus debet obediri*," was logically applied to the selection of pastors. We read, therefore, in synodal acts from the ninth century onward that pastors should be appointed by the bishop,—or the *archidiaconus* or vicar-general acting in his name,—with the harmonious coöperation of the clergy and people of the district

<sup>45</sup> Synod of Orange (441), can. 10 (Hefele, II, 276). This is perhaps the oldest document for the *iuspatronatus*.

## 22 *Historical Development of Parishes*

concerned.<sup>46</sup> This custom prevailed not only in Italy, but also elsewhere, and Magister Gratian received it into his *Decretum*.<sup>47</sup> It has not been neglected by the Code, but safeguarded.<sup>48</sup> The same canon mentions presentation, which, however, is based upon the *iuspatronatus* alluded to above.

### 5. *Pastor and Parishioners*

After the middle of the sixth century the priest appointed to a rural parish was called archpriest, analogously to the archpriest of the cathedral church, who had to attend to

<sup>46</sup> Synod of Rome (826), can. 8. A Synod of Pavia (855) says: "*In ordinandis plebium rationibus civium instituta serventur et pestiferae ambitionis vitium radicitus extirpetur . . . et primum quidem ipsius loci presbyteri vel ceteri clerici idoneum sibi rectorem eligant; deinde populi, qui ad eandem plebem aspiciunt, sequatur assensus: si autem in ipsa plebe talis inveniri non potuerit, qui illud opus competenter peragere possit, tunc episcopus de suis, quem idoneum iudicaverit, inibi constituat.*" (Mansi, *Coll.*, XV, 17).—Among the things which prompted the synod to this enactment are mentioned nepotism and avarice.

<sup>47</sup> C. 20, Dist. 63,—the source of which, according to Berardi and Friedberg, is unknown.

<sup>48</sup> Can. 455, § 1. This is still practiced in Switzerland.

the religious services at the city or cathedral church and to watch over the clergy of inferior rank. Similarly, after rural parishes had been established, these archpriests, sometimes identical with rural deans,<sup>49</sup> had other priests, deacons, subdeacons, and inferior clergymen under their supervision. Besides, there were clerics who served at the oratories or basilicas which had been built in hamlets (*villae*) and on estates owned by the wealthy. These clerics, too, were responsible to the archpriest.<sup>50</sup> This was a disciplinary measure resembling the vigilance committees appointed by Pius X. For the archpriests did not share in the judiciary power which was exercised by the archdeacon or vicar-general by mandate of the bishop. As the archpriest was appointed, so he could be removed by the bishop. However, this power was limited by synodal rules. Thus it was enacted

<sup>49</sup> The sources, however, are not sufficient to render this assumption certain beyond reasonable doubt.

<sup>50</sup> Synod of Tours (567), can. 19; Synod of Auxerre (578), can. 20 (Hefele, *l. c.*, III, 22, 42). The archpriest had to denounce delinquent clerics to the bishop or archdeacon. (Loening, *l. c.*, II, 348).

## 24 *Historical Development of Parishes*

that archpriests should be removed only with the advice of the other priests and after a crime had been committed.<sup>51</sup>

The most important *parochial right* was that of *baptizing*. This was quite natural because the right to administer Baptism was the distinctive feature of a parish church, so much so, that "baptismal church" signified "parish church." Hence it was that the Sacrament of initiation could be lawfully administered only in parish churches, while other oratories were debarred from this privilege. These minor *tituli*, and more especially private oratories, were not even allowed to have service on the days on which Baptism was conferred, *viz.*, Easter, Pentecost, and St. John's Day.<sup>52</sup> According to the Synod of Agde, there were other feastdays

<sup>51</sup> Synod of Tours, can. 7; Synod of Paris (615), can. 11 (Hefele, III, 21, 65).

<sup>52</sup> The practice was neither uniform nor constant. Some synods allowed Baptism to be administered on Holy Saturday (Hippo, 393, can. 3; Hefele, II, 52); some on Easter and Pentecost (Gerunda [517], can. 4); some on these two days and Epiphany (Irish Synods, can. 19; Hefele, II, 567); in Gaul Easter, Pentecost, and St. John's Day were the appointed days.

on which no service was permitted in churches or oratories which were not parochial or baptismal churches, *viz.*: Easter, Christmas, Epiphany, Ascension, Pentecost, St. John the Baptist's, and some other main feastdays.<sup>53</sup>

The parish priests were in duty bound to preach to the people on all Sundays and holydays. If the pastor was prevented from preaching, a deacon had to read a homily from the Fathers.<sup>54</sup>

To the pastor, finally, belonged the right to bury his parishioners.<sup>55</sup>

While the parish priests, as we have noted, had the free administration of the parish *property*, under the supervision of the bishop, they were strictly forbidden to alienate church property or to allow it to deteriorate. The priest's relatives had no claim against the church property.<sup>56</sup>

<sup>53</sup> Can. 21 (Hefele, II, 636). The priest who ventured to transgress this precept was to be excommunicated.

<sup>54</sup> Synod of Vaison (529), can. 2 (Hefele, II, 720).

<sup>55</sup> Zorell in *Arch. f. K.-R.*, 1902, 265.

<sup>56</sup> Synod of Orleans (541), can. 34; Synod of Arles (554), can. 6 (Hefele, II, 761; III, 9).

## 26 *Historical Development of Parishes*

On the other hand, the *parishioners* were obliged to deport themselves as members of the parish to which they were assigned. The ancient canons on this subject sound rather harsh to modern ears. Thus the Synod of Nantes (658) strictly demanded that the priest, before commencing the parochial Mass, should ask whether there be a stranger who belongs to another parish and came hither in contempt of his pastor. If such was the case, the stranger had to be expelled.<sup>57</sup> The great Reform Council held at Paris in 829, at the request of Louis and Lothair, complains of a perverse custom, namely, that quite a few priests dared to say Mass in private houses and gardens. The bishops were exhorted to uproot this abuse and priests who disobeyed were threatened with deposition, except where there was a case of strict necessity, *e. g.*, when they traveled or were a great distance from the parish church. The synod goes so far as to say that the people should rather not hear Mass at all than hear it in a place where no Mass is allowed to be

<sup>57</sup> Can. 1 (Hefele, III, 97).



said, *i. e.*, outside the parish church.<sup>58</sup> This confirmed what Charlemagne had enacted in his Capitularies: "No priest shall admit to his Mass the parishioner of another parish, except the latter be traveling or in case of a diet," *viz.*, when a mixed synod was held. Another law of Charlemagne said that no priest should dare to sing Mass in another's parish church, except when traveling, or to receive the tithes of another's parish.<sup>59</sup> The same Emperor ordained that every parish should have its own limits, within which the tithes are to be paid.<sup>60</sup> From their own pastor, therefore, the parishioners had to receive the Sacraments and hear the word of God, at his service they had to be present, and to him they were obliged to pay their dues, especially the tithes.<sup>61</sup>

The *functions* of the parish priest in the

<sup>58</sup> Lib. I, cap. 47 (Mansi, *Coll.*, XIV, 566); *Conc. Roman.* (853), can. 17 (*ib.* 1004).

<sup>59</sup> *Capitularia ab Ansegisio Collecta*, nn. 147 f. (Migne, *P. L.*, 97, 532).

<sup>60</sup> *Ibid.*, n. 149.

<sup>61</sup> Loening, *l. c.*, II, 352; Zorell in *Arch. f. K-R.* 1902, 265. A parishioner who did not attend the parish service on three consecutive Sundays was to be excommunicated; Synod of Ravenna (877), can. 12 (Hefele, IV, 505).

## 28 *Historical Development of Parishes*

ninth century are summed up in the acts of the Council of Aix-la-Chapelle, A. D. 836. There the pastors are called ministers of the Body and Blood of Christ, who should preach the word of God; should take care of all those who belong to their parish, as partners and fellow-laborers of the bishop; watch over their subjects from the cradle to the grave; lead them to the bishop from Baptism to receive Confirmation; teach them the "Our Father" and the "Apostles' Creed," and how to live a good Christian life; they should see to it that their parishioners do not die without receiving the Sacraments, and, finally, should recommend them to God and bury them, not as pagans, but in a Christian manner.<sup>62</sup> Regino of Prüm gives some more details. The pastor, he says, must accurately observe the canonical hours, say Mass about nine o'clock, announce the ecclesiastical feasts and fasts, admonish the people to receive Holy Communion at least on Christmas, Easter, and Pentecost.<sup>63</sup>

<sup>62</sup> *Conc. Aquisgranensis* II, can. 5 (Mansi, XIV, 880 f.).

<sup>63</sup> *De Ecclesiasticis Disciplinis*, l. I (Migne, P. L., 132, 187 ff.); there are 93 questions which the bishop was supposed to ask the parish priest at the time of the canonical visitation.

To the bishop were reserved the solemn blessing of the people and the blessing after public penance before absolution from censure; the blessing of the holy oils and the sacred chrism; administering Confirmation; giving permission to build and consecrating churches and oratories; receiving the solemn profession of virgins and widows; exercising disciplinary power and administrative jurisdiction concerning property, etc.<sup>64</sup>

## *6. Division of Parishes*

While the Christian religion was expanding, new parishes sprang up and new dioceses were formed. But after the work of conversion had been completed in a diocese, the need for new parishes was less felt and definite parish boundaries were fixed. Popes Zosimus (417-418) and Gelasius I (492-496) enacted laws forbidding parish changes;<sup>65</sup> but among the Teutonic tribes parishes continued to be divided up to the

<sup>64</sup> Loening, *l. c.*, II, 350 f.

<sup>65</sup> Zosimus *ad Hesychium* (Mansi, IV, 347); Gelasius see c. 5, C. 16, q. 3; H. Gyr, *Die Pfarreinteilung nach kirchlichem und staatlichem Rechte*, Einsiedeln 1916, page 43.

ninth century, although such divisions were not exactly frequent. A Synod of Toulouse (844) forbade indiscriminate dismembration of parishes, but admitted the erection of new parishes under certain conditions, *viz.*, if the way to church was too long or if there was danger from torrents or forests, so that women, children, and the aged could not attend the parish church. However, if the pastor could, without danger and in due time, visit these distant parishioners, an altar or a chapel was to be erected there and the parish remain undivided. If this was not feasible, the bishop, after having taken counsel with his advisers, and having only the utility and welfare of the faithful in view, was to proceed to a division, assigning a proportionate share of the income to the new parish.<sup>66</sup> However, the enormous extent of ancient parishes, many of which comprised twenty-five geographical square miles and twenty or thirty villages, often rendered division advisable, and hence many such divisions were made from the eighth to the tenth century. But after the eleventh, and still more after the twelfth cen-

<sup>66</sup> Can. 7 (Mansi, XVIII, *bis*, 24)

tury, the conservative spirit of the Church asserted itself in favor of the integrity of the existing benefices.<sup>67</sup> The Decretals, therefore, rather forbid than encourage divisions, like the well-known Decretal of Alexander II, "*Ad audientiam.*"<sup>68</sup> This was also the mind of the Council of Trent.<sup>69</sup>

The tithes due to the mother church were to be transferred *pro rata* to the new church.

A Capitulary of Charlemagne states that some synods were reluctant to grant the tithes to the new church,<sup>70</sup> but their scruples were mostly due to special circumstances.

## 7. *Parishes Held by Religious*

Monks, who for seven or eight centuries were the only religious, were considered fit and worthy to enter the *clerical ranks* by Pope Siricius (385-399), provided, says he, they are commendable for their gravity of manner

<sup>67</sup> Synod of Tours (1163), can. 1; see c. 8, X, III, 5.

<sup>68</sup> C. 3, X, III, 48.

<sup>69</sup> Sess. XXI, cap. 4, *de Ref.*

<sup>70</sup> *Capit. ab Ansegisio Collecta*, lib. I, n. 87 (Migne, *P. L.*, 97, 523); somewhat different, can. 14 of the Synod of Tribur, 895 (Mansi, XVIII, 140); Gyr, *l. c.*, 46.

### 32 *Historical Development of Parishes*

and blameless conduct and faith. After having received minor orders, they may, if they have entered the thirtieth year of age, be ordained deacons and priests.<sup>71</sup>

St. Gelasius I (492-496) also favored the ordination of monks, demanded a less rigorous examination for them and shortened the interstices between orders.<sup>72</sup>

Although *St. Benedict* most probably was not a priest, he not only admitted priests into his communities, but also ruled that the abbot might choose for ordination whomsoever he pleased, provided the candidate was worthy of the sacerdotal dignity.<sup>73</sup> We mention this fact to show that a merely lay institute was not intended by the Patriarch of the Western Monks, though there is an allusion in the Rule to the consent or permission of the bishop with regard to the ordination of subjects.

What *St. Gregory the Great* has to say on

<sup>71</sup> *Epist. ad Himerium Tarracon. Episc.*, n. 17 (Coustant, *Romanorum Pontificum Epistolae*, Paris, 1721, page 635 f.)

<sup>72</sup> *Epist. IX (alias XV) ad Episcopos Lucaniae*, cap. 2 (Migne, *P. L.*, 59, col. 48); C. Trezzini, *La Legislazione Canonica di Papa S. Gelasio I*, Locarno, 1911, pp. 44, 74, 161.

<sup>73</sup> *S. Regula*, cc. 60-62.



our subject may be summarized in a few sentences: Monks may be promoted to ecclesiastical offices, but priests taken from the ranks of monks, if they are to function as priests, must not live in their monastery. If monks wish to have services in their oratory, a priest should be appointed for that purpose by the bishop. Consequently, there was to be no episcopal chair in the oratories of the monks, nor were their churches to be solemnly consecrated. These oratories of monks were not allowed to have public (solemn) Masses, nor a baptismal font, nor a cardinal priest, *i. e.*, an archpriest, or what may be called a resident pastor. Concerning the property of the monks Gregory enjoined the bishop (of Ravenna) not to meddle in the temporal administration, revenues, documents, property of monasteries, nor to diminish the monks' property by charges, nor to invade it, nor to commit any fraud thereon.<sup>74</sup>

Turning to the synods *from the sixth to the eleventh century* the following points appear

<sup>74</sup> *Gregorii I P. Registrum*, ed. Ewald-Hartmann in *Monumenta Germaniae*, 2 vols., 1891; see esp. I, 18; VIII, 27; VI, 44; IX, 165.

### 34 *Historical Development of Parishes*

somewhat uniform and constant in their enactments, although there are some minor variations:

a) Monks may be ordained with the consent of their abbot, but they must observe their vows even after ordination.<sup>75</sup> A synod of Rome (826) and later on other synods demanded that abbots be ordained priests.<sup>76</sup> Towards the end of the tenth century some abbots received pontifical insignia and the right to invite a bishop to pontificate in their abbey churches. These concessions indicate that gradually the monks were allowed to have services in their own churches and for their own subjects, religious as well as laymen, who were subject to the abbot, and that the abbot, as a synod of Rome (826) states, had jurisdiction over them in the penitential forum.<sup>77</sup>

b) Concerning *parochial rights outside the monasteries*, a synod of Tarragona (516) rules that monks should not perform ecclesias-

<sup>75</sup> Synod of Agde (506), can. 2; Synod of Carthage (537), (Hefele, II, 636, 738).

<sup>76</sup> Can. 27 (Mansi, XIV, 1007).

<sup>77</sup> See our *Commentary on the New Code*, Vol. III, p. 30.

tical functions unless commanded by their abbot.<sup>78</sup> This sounds like exemption from episcopal jurisdiction, but it is not repeated in other synodal acts. On the contrary, throughout this period monks are as a rule debarred from parishes and parochial functions. Thus at a meeting of bishops and abbots at Neuching in Bavaria, in 772, the latter had to promise that their subjects would not interfere with parish work in future.<sup>79</sup> A Bavarian synod of the year 799 decreed that no monk should have a parish.<sup>80</sup> To safeguard the parish rights it was also enacted that no baptisms should be performed in monasteries, nor funeral services be held there for the laity, nor their corpses be buried there without permission from the bishop.<sup>81</sup>

c) Although *tithes* were a subject constantly insisted upon by synods, we learn but little as to the right of monastic churches to

<sup>78</sup> Can. 11 (Hefele, II, 657).

<sup>79</sup> Hefele, III, 572.

<sup>80</sup> Synod of Riesbach-Freisingen-Salzburg, can. 24 (Hefele, III, 685).

<sup>81</sup> A Frankish synod of ca. 615, can. 5 (Hefele, III, 685). The synod of Tribur (895) allowed burial in the monastery if the parish church was distant; can. 15 (Hefele, IV, 533).

### 36 *Historical Development of Parishes*

receive or their duty to pay them. There is a later canon which rules that monasteries must pay the tithes from the land which their *coloni* or free tenants tilled.<sup>82</sup> A remarkable struggle over tithes was fought between the Abbot of Fleury and Arnulf of Orleans. The Abbot defended the right of his monastic church to receive tithes, and in this claim was supported by the King and the Pope. But it required a papal privilege to vindicate this right to the monasteries.<sup>83</sup> From the same source we learn that bishops and laymen had usurped considerable church property and trenched on ecclesiastical rights, drawing a hazardous distinction between *ecclesia et altaria*. The church, they said, signified the temporal emoluments, the altar the spiritual power, which included the right of appointing priests and the exercise of spiritual functions. Hence laymen retained the "church,"

<sup>82</sup> A synod of Melfi (1089) decreed that bishops and abbots should receive tithes from their own men for the *benedictio* and guests, but families should pay tithes where they hear Mass all year round and where their children are baptized. (Mansi, XX, 725 f.).

<sup>83</sup> *Epistola ad G.* (Migne, P. L., 139, 440); see our *Commentary*, Vol. III, 28 f.

but were willing to leave the "altar" to the bishop. Many a feudal lord was willing to hand the *ecclesia* over to a well regulated monastery rather than to the bishop and the secular clergy.<sup>84</sup>

2. In the period that lies between the *eleventh century* and the *Council of Trent*, the struggle of the ecclesiastical against the secular power raged around lay investiture and celibacy.<sup>85</sup> Both questions occupied the attention of popes and synods. Thus, to quote only one or the other synod, a council of Melfi (1089) decreed that no layman should be allowed to offer his tithes, or his church, or whatever of ecclesiastical rights he possessed, to monasteries or canons, without the consent of the bishop or a papal indult.<sup>86</sup> A synod of Poitiers (1078) enacted that no abbot, or monk, or anyone else should impose penances, *i. e.*, hear confessions, unless entrusted with this office by the bishop, that abbots, monks, and canons should not buy or claim churches which they did not possess before, except with

<sup>84</sup> Philips, *Kirchenrecht*, 1869, Vol. VII, 338.

<sup>85</sup> Thomassinus, *Disciplina*, lib. III, cap. XXII, n. 2.

<sup>86</sup> Can. 5 (Mansi, XX, 723).



### 38 *Historical Development of Parishes*

the consent of the bishop in whose diocese they lived; in those churches, however, which they lawfully (or canonically) possessed they might take the revenues and benefices, though the priest appointed would be responsible for the charge of souls and the ecclesiastical service to be rendered to the bishop.<sup>87</sup> A synod of Poitiers (1100) forbade monks to exercise parochial functions (*viz.*, to administer the Sacraments of Baptism and Penance) and to preach.<sup>88</sup> A council of London (1102) ruled that monks could obtain churches only from the bishops and should not rob the parishes which they lawfully held to such an extent that the priests serving these would have to suffer want.<sup>89</sup>

Urban II (1088–1099), who needed the assistance of the religious orders to carry out the reform enactments of Gregory VII, made a quasi-dogmatical statement to the effect that monks were worthy of exercising pastoral functions (*viz.*, baptizing, giving Commun-

<sup>87</sup> Can. 5–6 (Mansi, XX, 498).

<sup>88</sup> Can. 11 (Mansi, XX, 1124).

<sup>89</sup> Can. 21 (Mansi, XX, 1152). These complaints are often echoed in synodal acts, especially in England (see c. 2, X, I, 10).

ion, imposing penances, and absolving from sins).<sup>90</sup>

A year before (1095), at the famous synod of Clermont, the same Pope had issued a decree which read: "In those churches where the monks live [abbey churches] the people shall not be governed by a monk, but the bishop shall, with the advice of the monks, appoint a chaplain, who shall govern the people, in such a manner, however, that the appointment as well as the removal of this chaplain and his whole conduct shall depend upon the good pleasure of the bishop."<sup>91</sup>

In a somewhat different form this canon entered the *Decretum Gratiani*, and in the form quoted it was received into the Decretals.<sup>92</sup>

Gratian had alluded to a union or concession made by bishops to monks *cum omni iure suo*. His disciple, Alexander III (1159-1181), changed this term into *pleno*

<sup>90</sup> Synod of Nîmes (1096), can. 2 f. (Mansi, XX, 934 f.). See the startling comparison there drawn between cherubs and monks.

<sup>91</sup> Can. 33 (Mansi, XX, 819, appendix).

<sup>92</sup> See cc. 6 f., C. 16, q. 2 and the *dictum* to the same, c. 1, X, III, 37. Gratian (*l. c.*) uses the term "*cum omni iure suo ab episcopis monachis conceduntur ecclesiae.*"

*iure*, and distinguished two categories of churches held by monks, *viz.*, such as were subject to religious *pleno iure* and such as were subject to them *non pleno iure*.<sup>93</sup> The fact of a union was not denied, therefore, but the *modus facti* had to be determined and proved in each and every case.

*Non pleno iure* meant that the monks could present to the bishop a priest whom he would then appoint for the parish, but who was responsible to the bishop for the care of souls, while he had to answer to the monks for the temporalities. The religious should not dare to remove the priest thus instituted by the bishop without consulting the latter. *Pleno iure* meant that the monks were allowed, not only to present, but to appoint the priest, who would thus be responsible to them in both spiritual and temporal matters.<sup>94</sup> This interpretation appears exorbitant, inasmuch as the bishop was thus excluded from his original right in <sup>95</sup> a parish which was *pleno iure*

<sup>93</sup> See c. 3, X, V, 33; Philips, *Kirchenrecht*, Vol. VII, 344 f.

<sup>94</sup> Philips, *l. c.*, 348 f.

<sup>95</sup> "*Episcopus habet intentionem fundatam in iure*," is an old and well-known adage of the law and the canonists.

incorporated, especially when the monastery was ruled by an abbess. To attribute such an idea to the popes in the thirteenth century, when Canon Law was already well developed, will hardly do. We therefore prefer to substitute for this commonly accepted theory another, suggested by the phrase "*convertere in proprios usus*," which occurs in many privileges of that time.<sup>96</sup> The meaning, then, would be that such churches were really the property of the religious and could, in case of necessity, be converted to their uses. This is, if we mistake not, the tenor of those privileges which grant the right to tithes and secure all the possessions which cluster around, or are assigned to, parochial and other churches. Thus, for instance, the monastery of Engelberg in Switzerland obtained from Adrian IV, Gregory IX, and Alexander IV several privileges which bear upon our subject. Adrian IV mentions advowson (*ius-patronatus*) for certain parishes, one of them

<sup>96</sup> As to abbesses, see the privilege granted by Alexander IV, June 10, 1260, in Potthast, *Regesta Pont. Rom.*, 1875, II, n. 17887; n. 17684; as to *convertere in usus proprios*: "*quas [ordo Praemonstrat.] in proprios usus habet ecclesias*"; n. 17766; also nn. 18066, 19469 f.

Stans in Nidwalden. The monks were allowed to select priests for all the parish churches which they possessed and to present them to the bishop (of Constance), who if these priests were fit, entrusted them with the care of souls, of which they had to render an account to him, whilst for their temporalities they were responsible to the monastery. A privilege granted by Alexander IV insinuates an unhampered presentation, though the term *collatio* is used.<sup>97</sup> The pope wished to safeguard the freedom of the monastery against office-seekers and benefice-hunters, who, as was frequently the case, might seek to obtain an expectation or *precaria* from either the bishop or the Apostolic See. It may, therefore, be said with some probability that the *plenum ius* was a combination of the ancient *ecclesia et altare*, or full incorporation of all the temporal rights and revenues accruing therefrom. Hence it was that the Apostolic See had so often to insist upon a

<sup>97</sup> Adalbert Vogel, O. S. B., *Urkunden des Stiftes Engelberg*, pp. 13, 18, 113: "*ut ad provisionem alicuius in pensionibus vel beneficiis ecclesiasticis ad vestram collationem seu praesentationem spectantibus compelli non possitis inviti.*" See Potthast, *l. c.*, n. 17519.

*sustentatio congrua* for priests presented by monastic bodies to their fully incorporated parishes.<sup>98</sup> The exorbitant consequence of the explanation here rejected was felt by later canonists, who therefore distinguished a three-fold kind of incorporation: *semitplena*, *plena*, and *plenissima*, and attributed the right of free collation only to the third kind, because *incorporatio plenissimi iuris* really involved a separate territory.<sup>99</sup>

Were the monks allowed to administer and govern their own parishes? As a rule synodal acts forbade them to do so, even under penalty of excommunication, yet made it possible if the abbot and bishop gave their consent, and in cases of necessity.<sup>1</sup> The Apostolic See, of course, was not bound by such synodal decrees, and hence abbots and monasteries sought to obtain an Apostolic indult, which was granted, at first only for such parishes as were attached to the abbey, and

<sup>98</sup> See c. 2, X, I, 10; c. 1, 6°, III, 4; c. 1, Clem. III, 12.

<sup>99</sup> "*Quando ecclesiae et populus sunt exempti*"; Fagnani, *Comment. in cap. 'Cum et plantare'*, X, V, 33 *de Privilegiis*; Philips, *l. c.*, VII, 354.

<sup>1</sup> Synod of Cognac (1238), can. 30; Synod of Tours (1239), can. 13 (Mansi, XXIII, 494, 500).



## 44 *Historical Development of Parishes*

later for parishes located at some distance away, on condition that the pastor should have companions of the same religious body.<sup>2</sup>

3. The *Council of Trent* did not essentially change this status, but laid down fixed rules concerning the rôle of the bishops and the *portio congrua* to be assigned to the one nominated by the regulars. The bishops should see to it that perpetual vicars (unless they deemed temporary vicars more profitable for the welfare of souls) were appointed with the right to sufficient support. These should be visited every year by the bishop.<sup>3</sup> Sess. XXV, on Regulars and Nuns, emphasized the episcopal visitation, correction and jurisdiction with regard to the pastors, regular or secular, of incorporated parishes, and forbade the appointment of temporary vicars except with the consent of the

<sup>2</sup> Thomassin, *l. c.*, lib. III, cap. 3. But the privilege quoted for the Abbey of St. Oudin is certainly attributed either to a wrong pope, or bears a wrong date, or is spurious; at least we can not find any such privilege in Potthast, *l. c.*

<sup>3</sup> *Conc. Trid.*, Sess. VII, cap. 7, *de Ref.* Some prelates at the Council objected to perpetual unions; see *Conc. Trid.* by the Görresgesellschaft, Vol. V, 1911, 983.

Ordinary, who also had to examine them.<sup>4</sup> Pius V partly modified and partly rectified the decrees of the Council. He modified the *portio congrua*, because some bishops exacted for the priest so high a salary that nothing was left to the monastic or religious community. He rectified the conciliar decree insofar as the regulars were allowed to present one of their own members for a vacant parish incorporated with their monastery. However, the one thus presented had to be examined by the Ordinary, who if he found him fit, could institute him in office. Besides the Pope commanded that a regular serving as pastor should have four companions.<sup>5</sup> Concerning the *socii*, says Reiffenstuel, Gregory XIII *vivae vocis oraculo* declared one to be sufficient, and custom, he adds, permits the pastor to be alone in his parish.<sup>6</sup>

Besides the monasteries, there were *other ecclesiastical corporations* which had parishes

<sup>4</sup> *Conc Trid.*, Sess. XXV, cap. 11, *de Reg.*

<sup>5</sup> *Ad exequendam*, Nov. 1, 1567 (*Bull. Rom. Luxemburg.*, Vol. II, 259). Abbots who wished to be pastors, also had to undergo the examination; S. C. C., June 7, 1755; Piatius Mont, *Praelectiones Iuris Regularis*, ed. 2, Vol. II, 20.

<sup>6</sup> *Comment.*, in lib. III, tit. 37, n. 9.

## 46 *Historical Development of Parishes*

united to their corporate body, *e. g.*, universities, colleges, and all kinds of charitable institutions. In fact some hospitals,—especially those devoted to the care of lepers,—appear to have possessed full parochial rights, so that they formed as it were a parish within the limits of another parish. Can. 23 of the third Lateran Council (1179) mentions that these houses had their own church, cemetery property, and a priest who administered all the Sacraments to the unfortunate inmates.<sup>7</sup>

The wholesale *secularization* that began in 1802 swept away many abbeys and convents, but not the parishes attached to them. These were continued and henceforth looked upon as part of the state treasury (*fiscus*) and the former vicars ranked as pastors.<sup>8</sup> Wherever a settlement was made with the Holy See, by way of a concordat, the religious lost their right to presentation, which was then claimed

<sup>7</sup> See c. 2, X, III, 48; c. 2, Clem. III, 11, which forbade that the funds of a hospital should be conferred on the hospital chaplain as a benefice in the canonical sense; *Theol. Quartalschrift*, Tübingen, 1890, Vol. 72, pp. 75 ff.

<sup>8</sup> *Theol. Quartalschrift*, l. c., 84 f.

by the State or by those named in the concordat or bull of circumscription.<sup>9</sup>

### 8. *Parishes in Commendam*

The Code (can. 451, § I), when defining the term "pastor," uses the phrase *in titulum*, which means holder, though not owner, of the parish, and its administrator. In contradistinction to this kind of beneficiaries who are called *in titulum*, there is a beneficiary who holds a parish *in commendam*. This phrase originally signified that a certain church was entrusted to the custody and care of a person who was not the pastor. Even bishoprics were sometimes, during a vacancy, confided to the care of another bishop.

In the eleventh century, however, a more mercenary motive was added, *viz.*, to increase the revenues of lean benefices. Hence parishes were entrusted to clerics who received a share of the parish revenues, while the pastor had to do the work, though he did not enjoy the full income from his benefice. The Council of Trent deplored the many abuses

<sup>9</sup> S. C. EE. et Regg., Dec. 14, 1855 (Pius Mont, II, 20, 677).

## 48 *Historical Development of Parishes*

connected with this system, but was unable, for the time being, to correct them.<sup>10</sup>

### 9. *Parishes in Canada*

Canada was first visited by missionaries who belonged to the Recollects. The first Mass was celebrated at Quebec, June 25, 1615. Ten years later the zealous and saintly Jesuits well known in the history of Canada arrived. But it was not until 1659 that the Vicar-Apostolic, Msgr. Laval, landed on the shores of "New France." A year later the province of Quebec had eight parishes; in 1722 there were twenty-four. There can be no doubt that these, or most of them, had all the marks of a canonical parish; they had boundaries, a resident priest, and an adequate endowment, which latter consisted mainly of the tithes or *dîmes* to be paid by the parishioners. Even adowson or the *iuspatronatus* was not wanting. Neither was there any essential change made with regard to church

<sup>10</sup> *Conc. Trid.*, Sess. XXV, cap. 21, *de Reg.*; see Berardi, *Commentaria in Ius Eccl. Univ.*, 1778, Vol. II, 49 ff.; Thomas-sin, *Vetus et Nova Disciplina*, P. II, lib. III, cc. 11 f.

matters after Canada became a dominion of the British Empire, in 1760, since the government of Great Britain was wise enough not to impose the anti-Catholic laws prevailing in England and Ireland on the newly acquired colony.<sup>11</sup>

#### 10. *Parishes in the United States*

The first Provincial Council of Baltimore was held in 1829. The acts, which were signed by one archbishop, five bishops, and the Vicar-Apostolic of Philadelphia, declared that at that time there was only one parochial benefice, *viz.*, in the city of New Orleans.<sup>12</sup> Hence, by implication, there were no canonical parishes in the United States in 1829, except in the city of New Orleans. Ecclesiastical history seems to bear out this statement. Yet if we did not stress too strongly the old conception that an ecclesiastical benefice implies stable funds, especially real estate, and perpetuity, we might

<sup>11</sup> See the excellent work of Jean-François Pouliot, *Le Droit Paroissial*, 1919, from which we have borrowed this brief sketch.

<sup>12</sup> *Decreta Conc. Balt. Prov. I in Coll. Lacensis*, 1875, Tom. III, 25.



find some parishes that would come up to the requirements of a canonical parish. Thus, for instance, the very first parish founded on our continent, St. Augustine in Florida, where the first Mass is said to have been celebrated Sept. 8, 1565, might truly be called a parish.<sup>13</sup> We can hardly doubt the existence of canonical parishes in Missouri, before it received statehood, in 1821. For Ste. Genevieve, St. Louis, Florissant, and St. Charles were parishes where the *Tametsi* had been published and consequently a *parochus proprius* was required. In fact we know that there were resident priests who had at least a house and something to live on, and the parish boundaries must have been fixed in one way or another.<sup>14</sup>

On the Pacific Coast, too, where the Franciscans did such excellent mission work, we

<sup>13</sup> See J. Gilmary Shea, *A History of the Cath. Church in the U. S.*, I, 137 ff. Perhaps St. Mary's in Maryland may also be called a parish; *ib.*, I, 48.

<sup>14</sup> See the splendid work of Louis Houck, *The Spanish Régime in Missouri* 1909, Vol. I, 115 f., where a very interesting report is reproduced on the "Religious Condition of Louisiana" in 1772; see also the same author's *History of Missouri*, 1908, I, 339; II, 302, 311.

can perceive the elements of canonical parishes. Thus Loretto in California had its fund, territory and organization. Yet the Padres declined to consider themselves parish priests or curates when the Mexican government, in 1825, proposed to make them such.<sup>15</sup>

The trustee system introduced in Bishop Carroll's time caused great trouble to more than one bishop for half a century after.<sup>16</sup> The first bishop of Baltimore said that there was no church property, properly speaking. In that case, of course, there could be no parochial benefices. Hence the successor of Carroll proclaimed to the aggressive trustees: "In the diocese of Baltimore none but the Archbishop can place or remove a priest; and that he can do at will, as there *are no parishes established here*, no benefices conferred, no collections made, and no powers granted but what are merely missionary, revocable at will. Hence the trustees can claim no jurisdiction

<sup>15</sup> See Engelhardt, *The Missions and Missionaries of California*, 3 vols., 1908-1913; I, 588; III, 425; also I, 131 f.; II, 246 ff.

<sup>16</sup> See P. Guilday, *The Life and Times of John Carroll*, 1922, page 762.

over their priest, nor prevent missionary functions.”<sup>17</sup> This, indeed, canonically speaking, is not quite logical, but it at least proves that those bishops held that there were no canonical parishes in America.<sup>18</sup> Bishop F. P. Kenrick, in 1844, took a step towards the canonical organization of his diocese by dividing the City of Philadelphia and its adjoining territory “into districts, after the manner of parishes, conformably to the decree of the Council of Trent, and to a statute.”<sup>19</sup> This was a logical result of the development of the Catholic Church in the United States.

Before the federal Constitution was adopted by the Thirteen Colonies, in 1787, the laws were more or less hostile to the Catholic Church, or at least discriminated against it. The spirit of bigotry imported from across the ocean still haunted the dissenters. The first amendment to our Constitution was apt to redress some of the existing grievances: “Congress shall make no law respecting an

<sup>17</sup> Shea, *l. c.*, II, 260; III, 27.

<sup>18</sup> This opinion prevailed as long as our country was under the Propaganda.

<sup>19</sup> Shea, *l. c.*, IV, 46.

establishment of religion or prohibiting the free exercise thereof." This amendment restrains *Congress*, but not the various State legislatures.<sup>20</sup>

The several States assumed a diverse attitude towards church property, one of the main points at which the two powers came into contact. In a report sent to Rome in 1785, Bishop Carroll says: "There is properly no ecclesiastical property here: for the property by which the priests are supported is held in the names of individuals and transferred by will to devisees. This course was rendered necessary when the Catholic religion was cramped here by laws, and no remedy has yet been found for this difficulty, although we made an earnest effort last year."<sup>21</sup> But gradually a more equitable state of things prevailed. General incorporation laws were enacted, and the policy of most of the States has been so to frame their legislation that each denomination of Christians may have an equal right to exercise religious profession and wor-

<sup>20</sup> Karl Zollmann, *American Civil Church Law*, 1917, page 9.

<sup>21</sup> Shea, *l. c.*, II, 260.

ship, and to support and maintain its ministers, teachers and institutions in accordance with its own practice, rules and discipline.<sup>22</sup> Thus in Pennsylvania the legislature on February 20, 1844, passed a law empowering the Catholic Bishop of Philadelphia and the Catholic Bishop of Pittsburgh, and their respective successors, to take and hold real and personal property for the support and maintenance of any hospital, almshouse, seminary, church, or parsonage, or other religious or charitable purpose.<sup>23</sup> Two States are an exception to this general benevolent tendency, Virginia and West Virginia, which have absolutely prohibited in their constitutions the grant of any "charter of incorporation . . . to any church or religious denomination." There is absolutely no reason for such a mortmain (deadhand) policy, which denies a substantial right to unoffending citizens because of an academic theory, and that in a country where equality is preached and regarded as the foundation of the Constitution.<sup>24</sup>

<sup>22</sup> Zollmann, *l. c.*, page 24.

<sup>23</sup> Shea, *op. cit.*, IV, 46.

<sup>24</sup> Zollmann, *l. c.*, page 25. The theory consisted in the old-

Non-Catholic congregations in the original thirteen States had also established churches, known by different names, but generally called *territorial parishes*, which were as much public corporations as towns and school societies.<sup>25</sup>

Closely connected with and dependent on the territorial parish in some States, and independent of it in others, we find another form of religious corporation, namely, the *corporation sole*. This legal entity consists of one person at a time. When that person dies, his successor in the particular office or station in relation to which the corporation was created assumes his duties and privileges. This corporation was constituted solely for the purpose of holding property for the parish. On the death of the corporator the fee would be in abeyance till his successor was elected. An attempt by the parish to alienate was absolutely futile, for if there was a minister, the

time apprehension that church corporations might become too wealthy and powerful. One of the first mortmain laws was that enacted in France in the XIIth century. See Coulondre, *L'Acquisition des biens*, etc., 1886, page 137 f.; Bachofen, *Summa Iuris Eccl. Publici*, 1910, page 40.

<sup>25</sup> Zollmann, *l. c.*, p. 39 f.



fee was in him, and if there was a vacancy, the fee was in abeyance, and a corporation could not acquire a freehold by a disseizin committed by itself.<sup>26</sup> However, this old form of corporation sole did not exclude the possibility of lay management when the holder died or went out of office. Hence Catholic communities, especially such as had been sorely tried by lay trustees, aimed to concentrate the management of the church property in the bishop or priest. After some opposition on the part of legislatures, many States finally settled the question by statutes, which are of a very simple nature: the bishops are authorized to become corporations sole by complying with certain prescribed conditions, very often consisting merely of the filing of some statement, certificate or affidavit with a certain civil officer.<sup>27</sup>

Another form of holding church property was the *trustee corporation*. When this proved liable to inconvenience and abuse, an

<sup>26</sup> *Ib.*, p. 43. However, let it be stated that, as far as we have consulted the usual sources, there is hardly any State in the U. S. which admits a corporation sole, pure and simple.

<sup>27</sup> Zollmann, *l. c.*, p. 49 ff.

effort was made to remedy the evil by setting up a statute which should incorporate the board of trustees, these being chosen by the respective community, not for life, but for a certain term. But even with this restriction it was not difficult for obstreperous trustees to cause trouble, as history proves.<sup>28</sup> Neither can this system be said to conform to the spirit of Canon Law.

Much less in keeping with this law is the *corporation aggregate*, which means that the whole parish, as a body, is the corporator or the body vested with corporate rights.

Another method of holding church property is that called *in fee simple*, which signifies an estate of inheritance, clear of any condition, limitation, or restrictions to particular heirs. It was generally understood to be vested in some person or other. This, like corporation sole, from which it appears to differ but slightly, could be in abeyance, that is (as the word signifies), in expectation, re-

<sup>28</sup> *Ib.*, p. 58 f. Concerning the history see Guilday, *l. c.*, p. 762; also the *Life of John Card. McCloskey* by John Card. Farley, 1918, especially pp. 184-194 concerning the troubles which the intrepid Archbishop Hughes had to encounter.

58    *Historical Development of Parishes*  
membrance, and contemplation in law; thus  
in case of a parson of a church, who had only  
an estate therein for the term of his life, the  
inheritance remains in abeyance.<sup>29</sup>

<sup>29</sup> Blackstone-Cooley, *Commentaries on the Laws of England*,  
1879, II, 106.

## CHAPTER II

### THE ESTABLISHMENT OF PARISHES

We said above (p. 2) that can. 216 appears to contain a definition of a canonical parish. There is no doubt that the legislator intended to enjoin on the Ordinaries the duty of dividing their dioceses into minor parts distinct from one another (*in distinctas partes territoriales*). It follows that bishops are not at liberty to supersede this law, already inculcated by the Council of Trent.<sup>1</sup>

The *competent authority*, therefore, for establishing a parish is the *local Ordinary*, who is such at least *de iure*. For it may be that he is impeded or prevented from governing his diocese in person, in which case there would be *sedes impedita*.<sup>2</sup> Yet even under this condition a bishop could validly and licitly es-

<sup>1</sup> Sess. XIV, cap. 9, *de Ref.*; Sess. XXIV, cap. 13, *de Ref.*

<sup>2</sup> Can. 429.

establish parishes. On the other hand, a bishop who has effectively resigned his office, or has been deprived of, or removed or transferred from his diocese, cannot validly or licitly erect parishes.<sup>3</sup> Much less can a censured bishop, whose censure has been made known to him by a declaratory or condemnatory sentence, establish parishes.<sup>4</sup> It should also be noted that a bishop cannot exercise this power before having taken canonical possession of his diocese, *viz.*, by presenting the Apostolic letters of appointment to the chapter or the diocesan consultors.<sup>5</sup>

Is the *vicar-general* entitled to establish parishes? Can. 216 does not exclude him from this right in general. However, if the parish is to be a benefice, or, in other words, a canonically established parish, the vicar-general needs a *special mandate* from the bishop.<sup>6</sup>

The power of *coadjutors* to establish parishes is determined by the Apostolic letters

<sup>3</sup> Can. 183; can. 208.

<sup>4</sup> Can. 2284; see can. 429, § 5.

<sup>5</sup> Can. 334.

<sup>6</sup> Can. 1414, § 3.

of appointment and the physical condition of the *coadiutus*.<sup>7</sup>

*Administrators Apostolic*, who are appointed permanently, enjoy equal powers with residential bishops,<sup>8</sup> and hence can establish parishes. *Temporary* administrators are on a par with the vicar-capitular or our administrator during the vacancy of the episcopal see, and hence are not excluded by the Code from erecting parishes. However, they are allowed to confer a parish which is of free collation, *viz.*, reserved by law to the bishop, only after a year of vacancy.<sup>9</sup> Hence if an administrator should see fit, he may, provided he observes the prescribed solemnities, erect canonical parishes. However, since the Code requires a vacancy of one year, the administrator could, before the lapse of a year, appoint only a substitute or *oeconomus*, to serve until the year expired, and after the year had elapsed, confer the parish permanently on this substitute or on another cleric, whom he may choose according to the law.

<sup>7</sup> Can. 351.

<sup>8</sup> Can. 315, § 1.

<sup>9</sup> Can. 315, § 2; can. 414, § 2; see can. 1414.



*1. Different Kinds of Parishes*

Can. 216, § 3 calls the minor divisions of a diocese *parishes*, and the minor divisions of a vicariate or prefecture Apostolic, if they have their own rectors, *quasi-parishes*. Hence we must conclude that in our continental United States there are parishes, because our dioceses are under the jurisdiction of the S. C. Consistorialis. Excepted from this general rule are the vicariate of Alaska, and our insular possessions, "mandates," or claims.

The Code does not determine the nature of these parishes beyond what is stated in can. 216, § 1. Hence, even after the Code had been promulgated and in effect for more than four years, doubts were entertained as to whether at least some of our parishes were parishes in the *canonical sense of the term*. In our *Commentary on the New Code* we maintained the affirmative, and our view was confirmed by a letter of Nov. 10, 1922, sent to all the bishops of this country. Here is the text of this letter:

Apostolic Delegation No. 3096—F

Rt. Rev. and Dear Bishop:—Notwithstanding the fact that several years have elapsed since the promulgation of the N. C. of C. L., there still seems to be some uncertainty in the U. S. as to the nature of the parishes in this country and as to the consequent obligation of the pastors who are in charge of them. Both these questions have been debated in published articles from time to time. In order definitely to end this uncertainty I deem it my duty to communicate to you an official answer which I received from the Cardinal President of the Commission for the Authentic Interpretation of the Code of Canon Law.

Under date of March 20, 1921, I submitted to the said Commission the following *dubium*: “For the erection of a parish which has not the character of a benefice: (*Ia pars*), is it necessary that the Ordinary should issue a formal decree declaring explicitly that he erects a certain district into a parish; or, (*Ila pars*), is it sufficient that, having divided a certain territory into several districts, the respective limits of which are definitely indicated, he assigns to each district a rector to take charge of the people and the church thereunto pertaining, according to Canon 216, No. 1 and No. 3?

Under date of September 26, 1921, His Em. Card. Gasparri, President of the above-named Commission, answered: "*Negative ad primam partem*," i. e., that a special decree of the Ordinary is not necessary for the erection of a parish; and, "*Affirmative ad secundam partem*," i. e., that it is sufficient, *quoad hoc*, for the erection of a parish, that the Ordinary define the territorial limits and assign a rector to the people and the church within said limits.

His Eminence, the President of the Commission added, moreover, that a parish is always an ecclesiastical benefice, according to can. 1411, § 5, whether it has the proper endowment (resources or revenue) as described and defined in can. 1410, or even, if, lacking such endowment (resources or revenue), it be erected according to the provisions of can. 1415, § 3.

In a second *dubium*, I asked further, if, after the promulgation of the Code, a special decree on the part of the Ordinary was necessary to constitute as canonical parishes those which, previous to the promulgation of the New Code, had been established in the manner described in the part of the first *dubium* as set forth above. The answer was that no decree is necessary, and that such parishes became canonical parishes, *ipso facto*, on the promulgation of the Code.

It is evident from this official answer, that all the parishes of the U. S. having the three necessary qualifications, *viz.* (1) a resident pastor; (2) endowment (resources or revenue according to the provisions of can. 1410 and 1415, § 3); and (3) boundaries, are not only parishes in the strictly canonical sense, but are also ecclesiastical benefices. Hence pastors in the U. S. are real, canonical pastors (*parochi*), having all the duties and obligations pertaining to such an office and (according to can. 466 and 399) are specifically bound to apply the *Missa pro populo* on Sundays and on Feastdays of obligation (including those that have been suppressed), this obligation binding them in conscience unless dispensation or commutation be received from the Holy See.

With sentiments of esteem and best wishes,  
I am,

Your's sincerely in Xo

✠ JOHN BONZANO,

*Archbishop of Melitene,*

*Apostolic Delegate.*

This "official answer" was in keeping with the Code as well as with the *Declaratio* of the S. C. Consistorialis of August 1, 1919, where the three conditions were expressly

mentioned: (a) a resident pastor, (b) endowment, (c) boundaries, and the Ordinaries were told that they might erect subsidiary parishes or chaplaincies, but only within the limits of a canonical parish.<sup>10</sup>

Doubts, however, seem to remain, especially concerning the boundaries,—be it from a preconceived idea that there was no formal assignment made, or for other reasons. If one should ask a pastor whether his parish had no boundaries at all, the fact would become apparent that the pastor, we might say instinctively, followed certain limits beyond which he would not go. Is there a custom, then, which has drawn fixed boundaries?—a custom which has the force of law because vested with the proper qualities?<sup>11</sup> We are aware that can. 1509, n. 4 allows no prescription to run against “certain and indubitable” parish lines; but can. 1509 is not against establishing boundaries by custom, but only against changing well fixed and undoubted boundaries. These are two essentially different points. Besides, even against can.

<sup>10</sup> See *A. Ap. S.*, 1919, Vol. XI, 346.

<sup>11</sup> Can. 28.

1509 an immemorial custom would prevail (can. 27). It does not matter how extended such limits are, whether they cover several counties or only a few square blocks of a city.

Yet we do not deny that pastors were really justified in their doubts, especially for the reason that the bishop was considered *the* pastor of the whole diocese, and all other priests only his delegates. This assumption no longer has any canonical foundation.

Concerning *national parishes*, we believe a distinction should be made. There are, especially in *large cities* such as New York, Chicago, and St. Louis, national parishes with well-defined lines. To suppose that these lack the conditions of a canonical parish is more than we are able to grasp. We do not deny that our national parishes have a precarious and, as it were, subsidiary condition, on account of various circumstances, but these conditions ought to be explained to the Roman authorities, who alone (can. 216, § 4) are able to settle the subject at issue. Somewhat different is the condition of *rural* national parishes, because they often extend over an indefinite territory and hence really lack one



of the three essential conditions of a canonical parish.

There is another difficulty concerning some parishes which *existed*, or still exist, in some of our States that were formerly *under another government*. We refer in particular to Texas and California, which at one time were under Spanish and Mexican rule. The present diocese of Corpus Christi once formed part of the old diocese of Monterey, which had "canonically established" parishes. For instance, La Bahia, when in charge of the Franciscans, is said to have had 15,000 souls, —Indians, Spaniards, and a mixture of both. There is a double question attached to this status: (a) suppose the Spanish element prevails in some parishes of the diocese, are these therefore "national" parishes? (b) Should the former boundaries of the old Spanish or Mexican parishes still be considered as circumscribing the parishes of the diocese established since 1874, when Corpus Christi became a Vicariate Apostolic, or since 1912, when it was erected into a diocese?

To answer the second question first, (b) we think first and above all, the old concor-

dates should be consulted. The circumscription or change of boundaries is a matter usually settled by concordats.<sup>12</sup> We have not read of a concordat with Mexico that would settle the circumscription of parishes situated in the former Diocese of Monterey.<sup>13</sup> After the revolution of 1836, the Republic of Texas joined the Union and was admitted as a State on Dec. 29, 1845. But we know of no formal or informal agreements between these governments and the Apostolic See. On the contrary, the whole of Texas was religiously in a rather deplorable condition until it had been admitted to the Union. The fact is, but little was left of the former parishes, either among the Spaniards or the Indians, during the revolutionary period, so that when Texas was made a Vicariate Apostolic, in 1841, the first Vicar, Rt. Rev. John M. Odin, was obliged to enter upon a mission field.<sup>14</sup> There is, then, not much hope to retrace the ancient

<sup>12</sup> Thus, for instance, in the concordats with Haiti, Nicaragua, S. Salvador, Venezuela, Ecuador; see *Raccolta di Concordati*, 1919, art. 11, 18, 14 etc.

<sup>13</sup> The *Raccolta* just named mentions no concordat with Mexico.

<sup>14</sup> Shea, *l. c.*, III, 706 ff.

parish limits, especially since the separation of Church and State was applied to Mexico, and the support, formerly granted by the Spanish and Mexican rulers, ceased after 1845.<sup>15</sup> This, of course, is not prescription, but might be called *vis maior*. Mere prescription would not efface old-established boundaries, even before the Code of Canon Law went into effect, this having been the law since the Decree of Gratian and the Decretals.<sup>16</sup> But to trace the former boundaries would be next to impossible. Hence the following rule may, with more or less probability, be laid down: Unless the ancient boundaries can be reliably traced, the establishing of parochial boundaries must be dated back only to the time when the Vicariate Apostolic or diocese was established. The same rule holds in California and elsewhere.

Concerning *California* there is a decision of the State Supreme Court which reads:

"According to all the Spanish and Mexican authorities, the missions were political es-

<sup>15</sup> Blair v. Odin, 3 Tex. Rep. 288 in C. Z. Lincoln, *The Civil Law and the Church*, 1916, page 674.

<sup>16</sup> See cc. 5, 6, C. 16, q. 3; c. 4, X, III, 29.

tablishments, and in no manner connected with the Church. The fact that monks or priests were at the head of these institutions proves nothing in favor of the claim of the Church to universal ownership of the property. If it be relied on that a priest or monk had government and control of the mission, the answer is simply that they were the civil governors; and although they combined with the power of civil government the functions of spiritual fathers, this was only the more effectually to carry out one of the objects of those establishments, which was to convert and Christianize the Indians. Neither the missions nor the priests of the missions were incorporated into the general body of the Church, nor were they in any respect under the control or direction of its diocesan ecclesiastics, whose rule was absolute over all their inferiors. On the contrary, the mission establishments arose directly from the action and authority of the government of the country; laws and regulations were made for them by its legislative authority, without referring to or consulting the authority of the Church, and the lands settled by them were not con-

veyed to anyone, neither to priest nor neophyte, but remained the property of the government, and there is not a word in all the decrees and acts of the government which would even show that the church building devoted to worship alone ever became the property of the Church corporate until the decree of secularization of 1833.”<sup>17</sup>

We may add that if there should be found a concordat entered into by the Holy See with a former government whose land, or part of whose land now belongs to the U. S., the latter would be obliged to respect this concordat until a new settlement could be obtained with the Apostolic See. The U. S. found an honorable and peaceful way of settling a similar difficulty in the Philippine Islands by the treaty of Paris, in 1898. “This treaty contained an article declaring that the cession of the Philippines, Porto Rico, and other territory ‘cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds of . . . ecclesiastical or civic bodies . . . having legal capacity to acquire and possess prop-

<sup>17</sup> *Nobili v. Redman*, 6 Cal. 325 (Lincoln, l. c., 666).

erty in the aforesaid territories.' It was soon found that by the Spanish law then in force in these islands the Roman Catholic Church was an ecclesiastical body and had a juristic personality and legal status. There was nothing for the courts to do but to recognize it as a corporation, allow it to sue and be sued, and give it the protection provided for by the treaty. It has therefore been said that the contention that the Catholic Church is not a corporation in these islands did not require serious consideration, being 'made with reference to an institution which antedates by almost a thousand years any other personality in Europe and which existed 'when Grecian eloquence still flourished in Antioch, and when idols were still worshipped in the temple of Mecca.' It follows that, so far as our island possessions are concerned, the Roman Catholic Church, with the Pope at Rome as its president, will be recognized by all the branches of the government as a corporation. Negotiations carried on at Rome with the Pope by a special agent of the President of the United States in regard to a disposal of some of the vast holdings of that Church are there-



fore entirely proper from any viewpoint whatsoever.

"The scope of this recognition, however, does not extend further than to the territory covered by the treaty. As to all other parts of the United States, the Catholic Church as such is not a corporation, but an hierarchy. A contention that it can own property as such is an 'inconceivable assumption.' As a sovereign power, a political and ecclesiastical state, it can acquire property in the various States only 'by treaty with the government at Washington.' " <sup>18</sup>

Can. 216, § 4 says: "No parish may be established for the faithful of diverse languages or nationalities living in the same city or territory without a special Apostolic indult, nor parishes consisting only of families or persons without such an indult; if such have already been established, no change may be made without consulting the Apostolic See."

In consequence of immigration the people of various nationalities that gathered in our hospitable land asked for priests of their own

<sup>18</sup> See Zollmann, *l. c.*, page 47 f.

race, who could speak their language. A priest might be able to speak several languages and thus satisfy the just demands of diverse races. A congregation gathered under such a spiritual head could not be styled a national parish. But *when a priest was or is exclusively appointed for a particular portion of the faithful who were or are united precisely by reason of speaking the same language, there was and is a national parish in the strict sense,*<sup>19</sup> *provided it was and is recognized as such by the authorities.* Such national churches sprang up in our country ever since the hierarchy took definite shape, correctly speaking, since Bishop Carroll's time. Holy Trinity Church, Philadelphia (1788), is the first national or racial church in the history of Catholicism in this country.<sup>20</sup> But

<sup>19</sup> Bluntschli says very appropriately: "Vulgar usage confuses the expression 'people' (*Nation*) and 'nation' (*Volk*); science must carefully distinguish them. . . . In English the word 'people,' like the French '*peuple*,' implies the notion of a civilization, which the Germans (like the old Romans in the word '*natio*') express by *Nation*. The political idea is expressed in English by 'nation' and in German by 'Volk.' (*The Theory of the State*, 2nd ed. of the English translation, Oxford, 1892, p. 86).

<sup>20</sup> Guilday, *l. c.*, p. 295.

national parishes, like national churches, always were fraught with danger. The very first racial congregation just mentioned "was the centre of a movement which has often disturbed the harmony of the Church down to the present time."<sup>21</sup> Add to the national character the idea of State interference in matters purely ecclesiastical, as practised in the "old country," and you will have traced the source of many troubles caused by arrogant trustees, and also, we are sorry to say, by conceited clergymen.<sup>22</sup> This fact proves the wisdom of can. 216, § 4, which reserves the establishment of, and changes in, such parishes to the Holy See.

In our tentative definition of a national parish we added: *provided it was or is recognized as such by the competent authorities.* This is now an essential condition for establishing a national church. Was it necessary before May 19, 1918? We do not hesitate to say it was. For even before the Code went

<sup>21</sup> *Ibid.*

<sup>22</sup> This experience was made at Baltimore; Guilday, *l. c.*, p. 723, and in a less degree, at New York, *ib.*, p. 628. But it must be noted that occasionally "kickers" cause a national parish to spring up; we know of examples.

into force a parish was considered a territorially, not linguistically, distinct portion of the diocese. Territorial parishes, as the word itself implies, were the rule, and consequently any exception had to be expressly stated. Bishop Carroll laid down very prudent conditions for the founding of a German (St. John's) church at Baltimore.<sup>23</sup> A national parish being somewhat like a State within a State, could certainly be canonically established only by the local Ordinary, especially if it was to enjoy full parochial rights. Whether this was done in every instance of our so-called national churches is beyond our knowledge. There are, on the other hand, in some places, *e. g.*, in Osage County, Missouri, several parishes called German, which became such merely by the fact that German Catholics settled there almost to the exclusion of those of other nationalities, and the German language consequently became pre-

<sup>23</sup> Guilday, *l. c.*, p. 727. He allowed St. John's to be considered only as a chapel of ease; "the rector or pastor of St. Peter's alone shall perform all pastoral functions such as baptisms, marriages, burials, the administration of the sick, regulations for Easter communion, and the first communion of young persons. He alone shall keep the register of baptisms, marriages, and burials."

dominant. These are plainly not national parishes according to the definition given.

We are now in a condition to answer the question put above: suppose the Spanish element is prevalent in some parishes of the Corpus Christi Diocese, are these parishes on that account "national" parishes? If they were founded, or at least recognized as such by the competent authorities, before May 19, 1918, they were and still are "national" parishes, to which can. 216, § 4 applies. On the other hand, the mere fact that Mexicans settled there and parishes were established for them, would not render them "national" parishes. Hence new American parishes springing up in places formerly having an entirely Mexican population, are and must be considered territorial, especially if, in the case of a parish erected after May 19, 1918, there was no papal indult.

The *Beneplacitum Apostolicum* granted, for instance, in favor of a religious community for one or more "Mexican" parishes, is not sufficient to make such parishes "national." A special indult is required for that purpose.

In concluding these brief remarks on national churches we wish to say that "national" churches are always more or less abnormal phenomena in canon<sup>24</sup> as well as civil law. The territory and citizens belong to "Uncle Sam," the Church to Jesus Christ, visibly represented by the bishops and priests.

Concerning *family and personal parishes* we need not trouble the reader. A family parish might be constituted for a royal house or an ambassador and his retinue. A personal parish might be established for soldiers or a colony of exiles. Military chaplains, as is well known, receive special faculties for their work.

Concerning parishes of a different rite than the Latin, the Code has not abolished them where they are lawfully established, since can. 1 leaves the Oriental discipline untouched.<sup>25</sup>

<sup>24</sup> One reason for saying so and maintaining that the ecclesiastical authorities had expressly to determine whether a parish was or was not "national," lies in the well-known aversion of the Church to innovation and alienation, as will be seen in Ch. III.

<sup>25</sup> See c. 14, X, I, 31; Blat, *Comment.*, Vol. II, *De Personis*, ed. 1921, p. 193.



Thus there are quite a number of *Greek-Ruthenian* parishes in our country, especially in Pennsylvania, all of which are under the jurisdiction of a Ruthenian bishop.<sup>26</sup> To call these parishes "canonical" in the strict sense, or according to the terms explained in the letter of the Apostolic Delegate, would, in our judgment, be hazardous.

As far as we are aware, there are in this country no *consistorial* parishes or benefices, *viz.*, parishes the establishment of, and appointment to which are reserved to the Apostolic See. But there are *religious parishes*, *viz.*, such as have been *pleno iure* incorporated with a religious community by virtue of an Apostolic indult. In this case the habitual care of the parishioners rests with the monastery or convent, though the actual pastor alone is in reality the pastor with all of a pastor's rights and duties.<sup>27</sup> Such incorporation, says the Code, can only be achieved by a *papal indult*. For this purpose two documents must be drawn up, one by the local Or-

<sup>26</sup> See *Ecclesiastical Review*, Vol. 37, 457 f.; Vol. 49, 473; Vol. 50, 725 ff.

<sup>27</sup> Can. 452.

dinary, the other by the religious community. In these documents the reasons for the incorporation should be stated, the boundaries clearly and minutely set forth, and the fact be mentioned that the Ordinary proceeded with the advice of his consultors (*auditis consultoribus*) and of the parties concerned, and the religious community with the consent of its chapter or councillors. The paper drawn up by the bishop goes to the S. C. Concilii, the one made out by the religious community, to the S. C. of Religious.<sup>28</sup> However, both documents may, in separate envelopes, be addressed under one cover to the S. C. of Religious. A copy of the rescript granted by the Holy See is to be kept in the diocese and in the archives of the religious institute, respectively, for reference.

Only those parishes are "religious" parishes or benefices (can. 1411, 2) which have been thus bestowed by the Apostolic See on religious; all other benefices, erected outside their own church or religious house, are presumed to be secular. Hence the importance

<sup>28</sup> This is best done through an agent in Rome or the Procurator of the religious (see can. 517).

of preserving a copy of all papal indults.

There are, in this country, also parishes which are *temporarily* entrusted to the care of religious. When the bishop, for instance, has lost a number of priests through death or other causes, and asks a religious superior to let him have a Father for a while, the parish entrusted to him is *not* a "religious" parish. We may be permitted to draw attention to can. 606, § 2, which requires the permission of the Holy See for such religious as have to stay outside their own houses for more than six months at a time.<sup>29</sup> Custom, however, appears to supersede this perpetual, and sometimes rather inconvenient, asking for permission.

Finally the Code distinguishes between *removable* and *irremovable* parishes, according to the degree of permanency enjoyed by the pastor.<sup>30</sup> The distinction is by no means baseless or unimportant, as may be seen from the procedure laid down in can. 2147-2161.

The Code states that an irremovable parish cannot be changed into a removable one with-

<sup>29</sup> See our *Commentary*, Vol. III, 505 f., ed. 3.

<sup>30</sup> Can. 454.

out an Apostolic indult, whereas a removable parish may, upon the advice of the episcopal consultors, be turned into an irremovable one by the bishop (not by the vicar-capitular or administrator, because *sede vacante nihil innovetur*).<sup>31</sup> All *quasi-parishes*, viz., those in prefectures or Vicariates-Apostolic, are removable.<sup>32</sup>

The removability or irremovability of a parish by no means affects its canonical character, for the Code plainly states that not all parish priests enjoy the same degree of irremovableness. Hence it may happen that an irremovable parish priest has not a canonically established parish, because proper boundaries are lacking. We do not deny that this seems abnormal; but the abnormal phenomenon is one of fact, not of law.

The Third Plenary Council of Baltimore demanded for the constitution of an irremovable parish that the mission or parish possess (a) a conveniently equipped church, (b) a school for boys and girls, (c) a decent presbytery, and (d) sufficient funds for the sup-

<sup>31</sup> Can. 436.

<sup>32</sup> Can. 454, § 4.

port of the priest, church, and school.<sup>33</sup> The Code does not contradict these wise regulations, nor does it gainsay entirely another ruling of the same Council, namely, that the number of irremovable parishes should be one-tenth of all the parishes in every diocese.<sup>34</sup> However, this rule only concerns the past, not the future. In future all parishes are to be irremovable, unless the bishop is compelled by special circumstances of place or persons to declare them removable, which he is empowered to do if he prudently deems it expedient, after hearing the advice of his chapter or consultors.<sup>35</sup>

## *2. Formalities Required for Erecting a Parish*

It might seem strange that the Code contains no special paragraphs describing the formalities required for the valid and licit erection of parishes. With the exception of can. 216, § 1, can. 451, and can. 455, it is apparently silent concerning this essential fea-

<sup>33</sup> *Acta et Decreta Conc. Plen. Balt. III*, 1884, n. 33.

<sup>34</sup> *Ibid.*, n. 35.

<sup>35</sup> Can. 454, § 3.

ture. However, there cannot be any doubt that the Code intends to have the laws governing benefices applied also to parishes. This is manifest from several canons which occur in Book III, tit. XXV, *De Beneficiis*, where parish churches are expressly mentioned.<sup>36</sup> Wherefore we do not hesitate to transfer to parishes, at least analogously, whatever the Code says with regard to benefices. This is all the more permissible if we recall the letter of the Apostolic Delegate quoted above.

1. On the part of *authority* it is required that it be competent to establish or erect a parish. Of this requisite enough has been said. We will only add that the *Roman Pontiff*, as head of the universal Church, can erect parishes in any diocese of the world, and therefore has cumulative power with the diocesan bishop or local Ordinary. To the Pope is also reserved the right to establish parishes or benefices which are generally conferred in consistory.<sup>37</sup>

*Cardinals* are not allowed to erect parishes

<sup>36</sup> See, for instance, canons 1423, 1425-1427.

<sup>37</sup> Can. 1414, § 1, 2.



within their titular churches, because parishes are benefices with the care of souls attached to them.<sup>38</sup>

Neither are *metropolitans* allowed to interfere with their suffragans in this matter.<sup>39</sup>

*Abbots or prelates nullius* have the same power in this regard as residential bishops in their dioceses.<sup>40</sup>

It is evident that governing abbots or *regular superiors* have no right whatever with regard to establishing parishes; much less, of course, does this right belong to superiors of non-exempt clerical institutes.<sup>41</sup>

2. Concerning the *financial* aspect, the Code rules that there must be a stable and sufficient endowment, from which the necessary and permanent revenues of the parish may be drawn.<sup>42</sup> Can. 1410 enumerates the following *sources of income or endowment*: (a) property owned by the church or parish as a corporation; (b) sure and regular con-

<sup>38</sup> Can. 1414, § 4.

<sup>39</sup> Can. 274 mentions no such right.

<sup>40</sup> Can. 323, § 1.

<sup>41</sup> All that can be vindicated to such superiors is a delegated power, but it must be expressly stated, not presumed or tacit.

<sup>42</sup> Can. 1415, § 1.

tributions to be collected from a family or juridical person; (c) voluntary but dependable offerings of the faithful to the rector of the parish; (d) stole fees determined by either diocesan statutes or lawful custom, and (e) for collegiate or cathedral churches only, the daily distributions, minus one-third.

(a) By *property* is chiefly meant real estate, which has always been preferred by the Roman Congregations in their many decisions concerning the subject.<sup>43</sup>

(b) Contributions or *praestationes alicuius familiae vel personae moralis*, are payments of interest or tithes due by reason of a contract or a legal promise. Thus a family may have a lease on the church property, or a juridical person may have an incorporated benefice which demands support of the beneficiary; such income is due and, humanly speaking at least, certain.

(c) *Voluntary offerings* of the faithful are chiefly "tithes," including subscriptions, plate and house collections, pew rent or revenues collected by such modern devices as the card

<sup>43</sup> See Trombetta, *Praxeos Regulae circa Contractus Rerum Ecclesiasticarum rite Ineundos*, Rome, 1865, pp. 173 ff.

system, budget, and other means and ways; but these, too, must be, humanly speaking, certain or dependable.

(d) *Stole fees* are given, not as a payment or salary, but as part of the cleric's decent support, and are supposed to be regulated by the diocesan statutes; to this category belong stipends from foundation Masses, but not manual stipends.<sup>44</sup>

Note that the Code says: *nisi constet de dote*. An endowment is essential for the erection of a parish, and hence the bishop can neither validly nor licitly proceed to the establishment of a parish, unless he has *proof* that an endowment has been provided.<sup>45</sup> This proof, however, need not be legal proof, *i.e.*, gathered from legally acknowledged documents or witnesses called to court. All that is required is that the bishop should be morally certain that there is a sufficient endowment. The Code goes a little farther—and this is new law, as is manifest from the lack of quotations,—by stating that “it is not

<sup>44</sup> Wernz, *Ius Decret.*, Vol. III, n. 183; Blat, *Comment. De Rebus*, 1923, lib. III, p. 382.

<sup>45</sup> Blat, *l. c.*, p. 388: “*ex motivis extraiudicialiter cognitis.*”

forbidden to establish a parish or quasi-parish, even if a sufficient endowment is not immediately available, provided it can be reasonably foreseen that the necessary support will be forthcoming.”<sup>46</sup>

Here the moral certainty concerns the future, not the actual condition, as stated in can. 1415, § 1. But some guarantee must be offered that the necessary support for church and ministers will be forthcoming. The Code does not determine the nature of this guarantee, but leaves it to the Ordinary to judge whether the guarantee offered is sufficient for granting the permission.

*How much money is required* for the stable and sufficient endowment of a parish? This depends entirely on the circumstances. No one, however, will doubt the wisdom of insisting on a goodly fund in hand before allowing building to begin. For the payment of interest after the parish is established is somewhat like the saying of the prophet Aggeus (I, 6): “He that earned wages put them into a bag with holes (*in sacculum pertusum*).” We can no longer reckon with a

<sup>46</sup> Can. 1415, § 3.

few hundred dollars, or with a few hundred *scudi*,<sup>47</sup> but have to multiply these units with thousands. We believe that one-half or at least one-third of the sum required for the necessary buildings and their maintenance would not be an excessive demand on the part of the Ordinary.

"If the endowment is made in specie or cash, the Ordinary should, after having heard the diocesan board of administrators, see to it that the money be invested as soon as possible in safe and interest-bearing property or titles," says can. 1415, § 2. A little business experience will tell that fake stocks and most of the oil, mining, etc., stocks issued nowadays offer no security. On the other hand, State or government bonds, or stocks and bonds of companies known to be honest and sound, present some security. The most secure of all investments, however, is real estate.

The money and the interest accruing from such a guarantee fund may not be used for any

<sup>47</sup> Formerly the cost of a parish church was calculated at 716 *scudi* (a *scudo* is about one dollar), the cement at 31½ *scudi*, the salary of the pastor at 90 *scudi*; see S. C. C., Aug. 2, 1823 (Lingen-Reuss, *Causae Selectae*, 1871, p. 751).

other purpose, no matter how urgent or sacred it may be. The local Ordinary, moreover, should not forget to consult the board of administrators, *i. e.*, those who, according to can. 1520, constitute the diocesan (not local) board for the proper administration of church property. Unless he calls them in, the deal is canonically invalid.<sup>48</sup> For although he is not bound by their advice, he is obliged to ask it. Besides, if a donor expressly stipulates that his donation must be applied to a certain church, the Bishop has no right to divert the money to another parish.

3. Concerning the *legal formalities* the Code in canons 1416 and 1418 sets up two conditions, which, however, are not of equal importance.

a) The first condition is that before a benefice or parish is erected, those who *are interested* must be *invited and heard*. This formality is essential, though the Ordinary is not obliged to follow the advice of those who are interested,<sup>49</sup> be they the neighboring

<sup>48</sup> Can. 105, n. 1; thus also Blat, *l. c.*, p. 389.

<sup>49</sup> This is expressed in can. 105, n. 1; hence what we said in Vol. VI, 499, of our *Commentary* should be corrected.



priests,<sup>50</sup> the lay persons who presumably will belong to the new parish, or the founder or prospective donor of a large sum of money. The invitation may be issued in the form of a public edict, published in any diocesan or local newspaper with a note stating the time when and the place where those interested are requested to appear.

b) Can. 1418 requires a *written document* or legal paper in which the place of the benefice or parish is designated, and its endowment, rights and obligations are described. However, the omission of such a document does not invalidate the act of erection, though a grave obligation exists to draw up such a document on account of the importance of the act. The document should contain an accurate description of the title or name of the parish, its boundaries and extent. Furthermore the nature of the endowment should be described, at least in general terms, according to can. 1410. Finally, the rights and obligations of the beneficiary or pastor should be set down. It would be proper to state in this

<sup>50</sup> S. C. C., Sept. 18, 1824 in *Aversana* (Lingen-Reuss, l. c. 749).

document whether the bishop wishes to exempt some religious or charitable institutes from the parish organization;<sup>51</sup> or whether he wishes to assign some families to another parish, because of more convenient access or a shorter road. Personal reasons, should not, however, enter into such an assignment, because exemptions of this sort are odious and easily breed discontent and lasting trouble to pastor and parishioners. Concerning families who live beyond the diocesan border it is impossible for us to see how bishops can make a compromise, since diocesan lines are approved and defined by the Apostolic See (can. 215, § 1). There is too much of sentimentality or expediency attached to such unwarranted connivance. Justice is the only foundation of peace. Besides, the maintenance of parochial rights within a given territory will facilitate proper administration and orderly procedure, and prevent the danger of invalid assistance at marriages. By saying this we do not, of course, wish to curtail the right of communicating so-called faculties.

<sup>51</sup> See can. 464, § 2.

Can. 1417 provides that the *founder* of a benefice may, with the consent of the Ordinary, lay down certain *conditions*, even such as run contrary to common law, provided they be reasonable and compatible with the nature of the benefice. Such conditions, once accepted, *cannot be validly suppressed or changed* by the local Ordinary, unless the change be favorable to the church, and even then only with the consent of the founder (or patron, if the benefice is one of advowson, *iuspatronatus*).

What is required for one to be considered the founder (*fundator*) of a benefice or parish? The Code does not define the term, unless we take can. 1544, § 1 (where pious foundations are determined) as a definition. A parish may be regarded as a pious foundation. Canon 1544 says: The term "pious foundation" signifies temporal goods given in any way to some ecclesiastical juridical person with the perpetual or long-continued obligation of saying Masses or performing certain ecclesiastical functions, or works of piety or charity in consideration of the revenues re-

ceived from said endowment. Every lawfully accepted foundation has the nature of a bilateral contract ("*do ut facias*"). From this it would appear that not so much the one who gives the ground or site for a church,<sup>52</sup> but rather the *dotator*, should be considered the founder; *viz.*, he who offers sufficient revenues for the upkeep of buildings and the support of the ministers and worship. However, it is by no means certain whether the legislator wished, in this can. 1417, to exclude from the term "founder" every other benefactor except the one who endows a church. On the contrary, the wording of can. 1544, § 1, especially the phrase, "*quoquo modo data*," seems to admit the *fundator* in the strict sense, *viz.*, the one who offers the ground as well as the *aedificator*, or the one who builds the church out of his own means, and the

<sup>52</sup> Canonists summed up the reasons for establishing the *iuspatronatus* in the verse: "*Patronum faciunt dos, aedificatio, fundus.*" Hence: "*fundator ecclesiae, qui dat fundum seu praedium seu spatium terrae; aedificator, qui suis sumptibus extruxit ecclesiam; dotator, qui sufficientem pro ministris, paramentis, luminaribus aliisque necessariis dotem assignat.*" Reiffenstuel, in lib. III, tit. 38, n. 4 ff.

*dotator*,—provided any one of these enter upon a formal agreement with the competent authority.<sup>53</sup>

The founder, then, has the right, *in limine foundationis*, to attach certain conditions to his gift. The date for setting up such qualifications is the moment when the temporal goods are delivered, not merely promised. These goods must be sufficient for the object and conditions of the foundation, otherwise the donor may be a benefactor, but he is not the founder or patron.<sup>54</sup>

The conditions laid down by the founder must be becoming and in keeping with the nature of the benefice endowed. Hence a founder cannot posit the condition that he himself shall be the beneficiary or pastor, because such a condition would be simoniacal

<sup>53</sup> With regard to eleemosynary foundations, such as colleges and hospitals, where there is an endowment of land, English law distinguishes two kinds of foundation: *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; and *fundatio perficiens*, or the dotation, in which sense the first gift of revenues is the foundation, and he who gives them is, in law, the founder; it is in this last sense that we generally call a man the founder. (Blackstone-Cooley, *Commentaries*, I, 480 f.).

<sup>54</sup> See Reiffenstuel, III, 38, n. 6, 9.

and therefore *inhonesta*. It would be a condition repugnant to the nature of a parochial benefice to stipulate or imply non-residence on the part of the pastor.

On the other hand, the Code says that a condition that runs counter to the common law of the Church is not necessarily unacceptable. Thus, for instance, can. 216, § 4 provides that in future no "national" parishes may be erected without an Apostolic indult. This is *ius commune*; but can. 1417, § 1 plainly states that a condition against common law must be admitted. Hence, if the founder inserts the condition that the parish shall be a "national" one, it cannot be suppressed or changed by the local Ordinary after the latter has accepted the stipulation, except with the consent of the founder, or by the Apostolic See for solid reasons. A permissible condition that a founder might make would be that the pastor should be taken from a certain family,—provided there be a fit clergyman in that family,—or from a certain race or nation.<sup>55</sup>

To sum up these formalities: (a) the au-

<sup>55</sup> Reiffenstuel, III, tit. 5, n. 107.



thority that erects a parish must be competent; (b) the endowment must be, either presently or prospectively, sufficient and adequately guaranteed; (c) the summoning of those interested is required for the valid erection of a parish; and (d) a document should be drawn up to that effect, especially to fix the boundaries. For the designation of strict limits is a requisite for a canonical parish. Where they have already been drawn or are observed by custom, it is not necessary to draw them anew, though an allusion to the existing status may not be superfluous.

### 3. *Corporate Rights*

1. The term *corporation* is derived from the Latin *corpus*, body. This body, *par excellence*, under the Romans law was the *populus Romanus* in its entirety.<sup>56</sup> Within this large public body minor bodies were allowed to form a union or association, which went by the name of *collegium*. One of the most ancient of these *collegia* was that of the priests,

<sup>56</sup> See O. Gierke, *Das deutsche Genossenschaftsrecht*, 1881, Vol. III, p. 77 ff.

which was legally recognized by the Roman Republic as a public corporation.<sup>57</sup> This was a logical consequence of the intimate union existing between the civil and the religious power.

There were also sodalities or *collegia templorum*. Every *corpus* or *collegium* required for its existence a legislative act by virtue of which it was incorporated into the general body politic of the republic. In this legislative act approval was given to the statutes, which had to be submitted in each individual case to the *senatus consultum* or decree of the Senate. Whether a certain amount of autonomy was granted by this sanction appears doubtful to some writers, but is more generally affirmed. Be that as it may, all agree that, after the grant by the Senate, a corporation was entitled to hold meetings, to set up ordinances or resolutions by majority vote, to admit and exclude members, to determine fees and fines, to select committees, and to elect officers with the power of a quasi-magistrate.<sup>58</sup>

Another element is the *right of ownership*,

<sup>57</sup> See l. 1, Dig. 48, 4; l. 2, Dig. 47, 22; an exception to this general law seem to have been the *collegia tenuiorum*.

<sup>58</sup> Gierke, *l. c.* III, 84 f.; Gaius in l. 1, Dig. 3, 4.

which, at the beginning of the corporate development, caused some trouble on account of the public character of corporations. But the jurists borrowed the proprietary right from that inherent in the individual, in other words, from the *ius privatum*, and considered the *universitas* or collective unity of the members of a corporation as the subject and carrier of that material, but important, right of ownership. However, it should be noted that the Roman law, under the republic at least, did not identify the sum-total of the individuals' proprietary rights with the collective right of the corporate members as such. The law or the *senatus consultum* granted or attributed to the corporation so much of the ownership as seemed necessary to carry out its purpose or end. Therefore, the right of proprietorship attached to the corporation was sharply distinguished from the right of ownership inherent in each member as a citizen or individual. It is the corporate right of ownership which the law attributed to a *corpus* or *collegium*, expressed, especially for this purpose, as an *universitas*, which was

represented by the *syndicus*, procurator or agent.

This conception of the corporation as an *universitas* led to another, *viz.*, that of a juridical person (*personae vice fungitur*).<sup>59</sup> Whether we are thus compelled to introduce a *fictio juris* is disputed among learned writers.<sup>60</sup> At any rate it requires some imagination to make one person out of a number of individuals, unless we simply state that the collective will of the corporation is the subject of rights, and in particular of proprietary rights.

It only remains to be added that each *corpus* or *collegium* was supposed to have a particular *purpose*, which was clearly defined in the statutes submitted to the *senatus consultum* or, later on, to the imperial constitution. It was the purpose, therefore, which

<sup>59</sup> See l. 22, Dig. 46, l. 9, § 2, Dig. 4, 2; Gierke, *l. c.*, III, 195.

<sup>60</sup> Gierke, *l. c.*, page 103, is strong for the fiction: "As part of the *ius publicum* the *universitas* was a reality, but no person; as subject of the *ius privatum* the *universitas* was a person, but no reality." Other writers just as reasonably assume a collective will, centered in the unity, as represented by the lawful head of the corporation, or syndic.

distinguished one corporation from another.

According to *Roman law*, therefore, a corporation may be *defined* as a juridical person, lawfully organized for a definite purpose. The elements are: (a) a legal constitution, (b) a plurality of members ("*tres faciunt collegium*"),<sup>61</sup> and (c) a definite purpose.

2. The next question is whether a *parish* is a corporation in ecclesiastical and civil law. A parish is a part and parcel of the Church Catholic, which is represented in Holy Scripture as a visible society or institute for religious purposes.<sup>62</sup> An invisible, merely spiritual church is warranted neither by Scripture nor by tradition. The Church of Christ is indeed, a mystic body, but one which appears and acts like a body politic, and derives its existence, not from men, but from God, not from the State, but from its Founder, who laid down the essential features of this living organism.<sup>63</sup> Consequently, its existence and

<sup>61</sup> Fr. 85, Dig. 50, 16, where Marcellus says: *Neratius Priscus tres facere existimat collegium, et hoc magis sequendum est.*"

<sup>62</sup> See Rom. XII, 4 ff.; 1 Cor. XII, 4 ff.; Ephes. I, 22 f.; Col. I, 24.

<sup>63</sup> Gierke, *l. c.*, III, 111.

duration depended on no *senatus consultum* or imperial constitution. The history of the persecutions shows that the Church was not a mere appendix to the State, but an entity distinct from, though not necessarily opposed to, the State.

When the Church entered as a peaceful subject into the *ius publicum* of the Roman Empire, the latter's first edict was that recognizing her right to hold property.<sup>64</sup> This *property right* was acknowledged as residing, not in the universal Church, but in the *single churches*, understood as juridical persons, and vindicated, therefore, to the "*concilium*" or "*conventiculum*" or "*corpus*" of the faithful who worshipped in that particular place or meeting house.<sup>65</sup> It is the "most holy," the "venerable," the "religious" or "blessed" church of such and such a city or town that is endowed with property rights. No other notion of ownership is in keeping with the Justinian Code.

<sup>64</sup> Edicts of Milan of 312-313; see Funk, *Manual of Church History*, 1913, I, 47 f.

<sup>65</sup> This excludes the theory, still held by some, that there are two subjects of property right, one immediate, the other mediate.



The *Corpus iuris civilis* promulgated by Justinian presupposes the property right as inherent in the individual or local church, subject to the bishop of the diocese.<sup>66</sup> It need not surprise us if we read of Christ, or an archangel, or a saint being the owner of this or that property,<sup>67</sup> for this invisible owner took, or was supposed to take, the place of a visible person. Justinian's legislation with regard to religious corporations was neither original nor progressive. It merely applied the old Roman notions of corporation to ecclesiastical institutions. Yet a difference is noticeable in Justinian's legislative acts, inasmuch as it would be next to impossible to find a law text which purports to be a creative or constituent act of foundation. In other words, the imperial theologian nowhere makes the foundation or creation of an ecclesiastical corporation dependent on an imperial constitution or rescript. On the contrary, these re-

<sup>66</sup> See II. 15-17; 20; 22; 23, Cod. I, 2; Nov. 67, cap. 1, 2; Aug. Knecht, *System des Justinianischen Kirchenvermögensrechtes*, 1905, 28 ff. (Stutz, *Kirchenrechtl. Abhandlungen*, n. 22).

<sup>67</sup> The classical text is l. 25, *Cod. Just.* I, 2, of Oct. 20, 530; also Nov. 131, cap. 9, of March 18, 545.

ligious institutions were simply inserted and adopted as they had previously existed, and were now recognized as juridical persons with a more or less fictitious feature. The above named fictitious ownership invested in Christ, or an angel, or a saint, had also a sacred, or, as some were pleased to call it, a transcendent character, as it insinuated the *purpose* of the property held. The property held by the church was intended for the *service of God*. It was, therefore, not to be enjoyed by the community, or parish, or diocese, as primary usufructuary, but to be used as something sacred, *viz.*, for the service of God, and shared by those who belonged to the so-called corporation only in as far as they partook of the altar. This naturally led to a gradual change in the aspect of the corporate character: it developed into an *institute* or permanent administrative organization with a definite purpose. At what time this notion began to be fixed in the Roman law cannot be determined with certainty.<sup>68</sup>

The Canon Law further developed and gave precision to the juridical concept of an

<sup>68</sup> See Knecht, *l. c.*, pp. 6, 16 ff.

institute with a corporate character. Out of the idea of the universal Church, the mystic body of Christ and mother of all the faithful, sprang,<sup>69</sup> as so many offshoots, the smaller limbs or living units, *viz.*, the individual churches, which were admitted in law as persons, and enjoyed the right of ownership together with other rights.<sup>70</sup>

Such appears to have been the view of the *ancient sources of Canon Law and their commentators*. Yet it would be difficult to prove that even at the height of the Roman-canonical literature an adequate distinction between the purely corporate notion and that of institution or pious foundation was elaborated, especially with regard to parishes. Canonists and legists started from the "*universitas corporum*," and applied it to various collective bodies. To cathedral and collegiate chapters they could unhesitatingly apply the formula: "*Plurium corporum distan-*

<sup>69</sup> An Anglo-Saxon writer says: "*ealle we habbadh aenne heofonlicne faeder and ane gastlice moder, seo is ecclesia genamed, that is Godes cirice, and thy we sin gebrothra.*" (Gierke, *l. c.*, II, 547).

<sup>70</sup> Gierke, *l. c.*, II, 548 f.; 959; III, 116.

*tium rationabilium uno nomine eis deputata collectio.*" But a difficulty arose when a single parish was to be subsumed under this category. For by reason of the essentially hierarchic character of the Church, the parishioners could not be considered as members co-equal with the rector. In order to obviate this difficulty, some canonists maintained that the rector or priest had the same position and rights as the prelate in collegiate bodies. He could go to law for his parish and could sue and be sued, either personally or by proxy; only concerning alienation he was not entirely free on account of administrative measures.<sup>71</sup>

However, the Canon Law did not vindicate the right of ownership to the parish as such, as if the parishioners, taken collectively, were the owners of the church property. Being of the laity, these parishioners could neither administer nor dispose of ecclesiastical property. Nor is mention made anywhere in the law sources that the consent or advice of the pa-

<sup>71</sup> Gierke, *l. c.*, III, 419 ff. and 272, where the sources are quoted.

rishioners was required for valid or licit acts permitted by law to the church authority. Furthermore, the very constitution, administration, and cessation of a parish was placed entirely into the hands of the superiors. If the parishioners were taxed or asked to contribute to the parish funds, this is similar to the State taxing its citizens, who have not on that account a claim on the public exchequer (*fiscus*).<sup>72</sup>

Where there was no complete separation of Church and State, the latter organized the parishioners *per modum corporationis* for the administration of the endowment, for the payment of taxes where such were required, and for the protection of accessory rights, such as advowson, if there were any. Otherwise the State acknowledged the parish as a canonically and locally organized religious institute administered by a lawful rector. The members of this religious organization, *i. e.*, those who live within a determined precinct, are served by the same rector and in the same church as to their spiritual wants, and con-

<sup>72</sup> Schulte, *System des Allgemeinen Kathol. Kirchenrechts*, 1856, page 479.

tribute *pro rata* to the support of the church and rector.<sup>73</sup>

In the United States it was customary, though not everywhere, for the bishops to hold all the church property of the diocese in *fee simple*. This custom, however, was certainly opposed to the spirit, if not to the letter, of the law. For the freeholder could legally transfer the property to anyone he wished, and thus alienate the property from its true purpose. Heirs of the bishop could, where no other legal provision had been made, claim such property for their inheritance.

Not without good reason, therefore, did the Apostolic See abolish the free simple method of holding church property, at the same time recommending the *parish corporation*, more especially in the form acknowledged by the statutes of the State of New York. Where the civil law did not admit such corporations, another form, *viz.*, the *corporation sole*, was to be selected. Where this latter form was adopted, however, the bishop, in the administration of church property, was obliged to

<sup>73</sup> See U. Lampert, *Die kirchlichen Stiftungen, Anstalten und Körperschaften*, Zürich, 1912, page 37 ff.



proceed according to Canon Law; that is to say, he had to hear those interested, and confer with the diocesan consultors, whose advice was absolutely necessary, and whose consent was of great importance.

What has the *Code* to say about parish corporations? But little, and that little widely dispersed.<sup>74</sup>

a) The pastor holds his parish *in titulum*, which means that he is the holder, not the owner, of the parish and of its property.<sup>75</sup> Therefore, the pastor,—be he an individual priest or an artificial person, such as a religious community,—is responsible for the parish and its proper administration. This is exactly what the older canonists, up to the Council of Trent and afterwards, held.

b) As a *benefice*, the parish is called a juridical entity (*ens iuridicum*), established by competent authority and consisting of a sacred office, together with the right to receive the revenues from the endowment attached to that office.<sup>76</sup> From the general title

<sup>74</sup> S. C. C., July 29, 1911 (*Ecclesiastical Review*, 1911, Vol. 45, 585 f.).

<sup>75</sup> Can. 451, § 1.

<sup>76</sup> Can. 1409.

of Part V, Book III of the Code ("*De Beneficiis aliisque Institutis Ecclesiasticis non Collegialibus*") we may conclude that a benefice or parish is not a collegiate or corporate body, but falls under the pious foundations (*fundationes piae*) mentioned in can. 1544. This is all the more probable, since parishes are not named among those non-collegiate ecclesiastical institutes which may be established as *juridical persons* by a decree of the local Ordinary.<sup>77</sup> Yet can. 99 shows that the Code attaches to benefices the notion of a moral or *juridical person*, though not of a collegiate person, and therefore does not regard them as corporations in the strict sense of the term. For a corporation in the strict sense requires at least three individuals.<sup>78</sup>

c) Such juridical persons or non-collegiate corporations are endowed with property rights, and, therefore, a parish is the owner of the church property invested in the benefice,<sup>79</sup> *i. e.*, either in the bishop or the pastor.

<sup>77</sup> Can. 1489, § 1.

<sup>78</sup> Can. 100, § 2.

<sup>79</sup> Can. 1495, § 2; can. 1499, § 2.

#### 4. *American Civil Church Law*

"In English ecclesiastical law it [the term *parish*] has been used to designate the territory committed to the particular charge of a parson or priest. In the absence of a State Church here however, the status of a parish is rendered comparatively unimportant; if used in ecclesiastical divisions, it has just such importance and particular signification as may be given it under ecclesiastical regulations. The rules of a church organization constitute the law for its government, and the civil court will, in general, recognize and enforce these as any other voluntary agreement between the parties. But what may be the law of the church government is a matter of fact in court of law, and must appear in the proof."<sup>80</sup> This is in perfect keeping with the oft repeated principle prevailing in our country, *viz.*, that the civil courts have, and will exercise, no jurisdiction in reviewing the actions of ecclesiastical bodies in matters relating purely to the faith and discipline of their

<sup>80</sup> *Tuigg v. Treacy*, 104 Pa. 493 (Charles Z. Lincoln, *The Civil Law and the Church*, 1916, page 434).

members.<sup>81</sup> "The bishop is the governing power of the Catholic Church in his diocese. He is said to be the supreme pastor, the supreme teacher, the supreme governor. It is his duty, under the laws and discipline of the Church, to administer the regulations above mentioned, and in so doing necessarily to construe and interpret them. His decision is to be final and conclusive, except as reviewed by his ecclesiastical superiors at Rome."<sup>82</sup>

This ruling can be accepted, as in accordance with the Code; see can. 329, 334-336, 343, and, with regard to the matter more closely connected, can. 216, § 1, 2; 455, § 1; can. 1414, § 2. But we cannot now, that the Code is in force, accept the statement made in a Massachusetts case: "Under the law of the Roman Catholic Church the bishop has full power in the administration of church affairs; *there are no separate parishes; the diocese is the parish and the bishop the universal parish priest; all power possessed by priests or pastors is delegated from the bishop.*"<sup>83</sup> The

<sup>81</sup> *Tulbright v. Higgenbotham*, 133 Mo. 668, *et passim* (Lincoln, l. c., 129 f.).

<sup>82</sup> *Bonacum v. Harrington*, Neb. 831 (Lincoln, l. c., 661).

<sup>83</sup> *Leahy v. Williams*, 141 Mass. 345 (Lincoln, l. c., 662).

words placed in italics are no longer true, even in our country, because contradicted by the Code.<sup>84</sup>

While single parishes may be incorporated as religious corporations or trustee corporations, territorial parishes as such are not acceptable as corporations. Thus a Nebraska court decided: "Territorial areas described in the nomenclature of the Roman Catholic Church as parishes, are not recognized by the law as corporate or political entities; and if they were such, the Church could not legislate concerning them."<sup>85</sup> This is quite intelligible from the viewpoint of the civil law, since a territorial parish or corporation would affect property and civil rights of pastor and parishioners; but this decision does not affect church law, first because, as stated above, most of the territorial corporations have ceased, and, secondly, membership in a corporation is not essentially connected with territorial extension.

<sup>84</sup> See can. 216, § 1; can. 451, § 1; can. 464, § 1.—The pastors' rights are ordinary (can. 462), not to be limited at random; their jurisdiction for hearing confessions also is ordinary, attached to the office; can. 873.

<sup>85</sup> *McEntee v. Bonacum*, 66 Neb. 651 (Lincoln, *l. c.*, 440).

It is generally held that *corporations sole* in the United States are rare.<sup>86</sup> The fact is that the term "corporation sole" sounds like a *contradictio in adiecto*. For it rests on a twofold fiction, *viz.*, first, the fiction (mentioned above) of the collective will united into one, and, secondly, that the bishop is the diocese.

Here may be added a few remarks concerning the *civil laws affecting religious corporations*.

a) A corporation, in civil law, is generally *defined* as a body consisting of one or more natural persons, empowered by law to act as an individual, and continued by a succession of members.<sup>87</sup>

b) A parish may be incorporated, in most of our States, as a religious corporation; it may also add as a further purpose, education,

<sup>86</sup> See *Cyclopedia of Political Science*, ed. J. Lalor, Chicago, 1881, I, 664; *Everybody's Legal Advisor*, ed. A. S. Bolles, New York, 1922, IV, 856.

<sup>87</sup> *Cyclopedia cit.*; Blackstone-Cooley, *Commentaries*, offer no definition proper, but Blackstone says: "Our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation"; but the English invention of a corporation sole is a juridical absurdity, and the rest of the refinement comes from the much maligned Canon Law of the "Romish" Church.



provided some educational institution, such as a parochial or high school, is immediately connected with the church. The "statutes" of each State must be properly obeyed and carried out.

c) The *Revised Statutes of Missouri*, 1919, state (Sect. 10,264): "Any number of persons not less than three,"—the State of Missouri knows no corporation sole,—"who shall have associated themselves by articles of agreement in writing, as a society, company, association or organization formed for benevolent, religious, scientific, fraternal-beneficial, or educational purposes, may be consolidated and united into a corporation. Such articles of agreement may be organic regulations, or a constitution, or other form of association, and any corporate name, not already assumed by another corporation, may be chosen as the title of the corporation; provided, always, that the purpose and scope of the association be clearly and fully set forth." . . . (Sect. 3433): "The persons holding the offices respectively of president, secretary and treasurer of the association, or other chief officers, by whatever name they may be known, shall

submit to the circuit court having jurisdiction in the city or country where such association is located, the articles of agreement, with the petition praying for a *pro forma* decree thereon. If the court shall be of opinion that such articles of agreement and the purpose of the association come properly within the purview of this article, and are not inconsistent with the Constitution or laws of the United States, or of this State, the court shall enter on record an order to that effect, a certified copy of which order shall, by the clerk, be indorsed upon or attached to said articles."

d) Similar laws exist in practically every State, prescribing the conditions on which corporations can be formed. Since, however, the above mentioned decree of the S. C. of the Council makes special reference to the laws of the State of *New York*, the passage from the New York statutes referring to parish corporations may here be inserted:

"An unincorporated Roman Catholic church or an unincorporated Christian Orthodox Catholic church of the Eastern Confession in this State may become incorporated as a church by executing, acknowledging, and fil-

ing a certificate of incorporation, stating the corporate name by which such church shall be known, and the country, town, city or village where its principal place of worship is, or is intended to be located.

“A certificate of incorporation of an unincorporated Roman Catholic church shall be executed and acknowledged by the Roman Catholic Archbishop or Bishop, and the Vicar-General of the diocese in which its place of worship is, and by the rector of the church, and by two laymen, members of such church, who shall be selected by such officials, or by a majority of such officials.

“On filing such certificate, such church shall be a corporation by the name stated in the certificate.

“The Archbishop or Bishop and the Vicar-General of the diocese to which any incorporated Roman Catholic church belongs, the rector of such church, and their successors in office, shall, by virtue of their offices, be trustees of such church. Two laymen, members of such incorporated church, selected by such officers or a majority of them, shall also be trustees of such incorporated church, and

such officers and such laymen trustees shall together constitute the board of trustees thereof. The two laymen signing the certificate of incorporation of an incorporated Roman Catholic church shall be the two laymen trustees thereof during the first year of its corporate existence. The term of office of the two laymen trustees of an incorporated Roman Catholic church shall be one year. Whenever the office of any such layman trustee shall become vacant by expiration of term of office or otherwise, his successor shall be appointed from members of the church, by such officers or a majority of them. No act or proceeding of the trustees of any such incorporated church shall be valid without the sanction of the Archbishop or Bishop of the diocese to which such church belongs, or in case of their absence or inability to act, without the sanction of the Vicar-General or of the administrator of such diocese."

"Wherever a Roman Catholic parish has been heretofore or shall hereafter be duly divided by the Roman Catholic Bishop having jurisdiction over said parish, and the original Roman Catholic church corporation is given

one part of the old parish, and a new or second Roman Catholic church corporation is given the remaining part of the old parish, and it further appears that by reason of the said division the original Roman Catholic church corporation holds title to real property situate within the part of the old parish that was given to the new or second Roman Catholic church corporation, then the said Roman Catholic Bishop or his successor shall have the right and power, of himself, independently of any action or consent on the part of the trustees of the original Roman Catholic church corporation, to transfer the title of the said real property, with or without valuable consideration, to the said new or second Roman Catholic church corporation. Said transfer shall be made by the said Roman Catholic Bishop or his successor after having complied with the requirements of the code of civil procedure in the same manner as the trustees of any religious corporation are compelled to do before making a transfer of church property. If a valuable consideration is paid for the transfer, the same shall be received by the said Roman Catholic Bishop

or his successor, and distributed between the said original Roman Catholic church corporation and the new or second Roman Catholic church corporation, in such proportions as in the discretion of the said Bishop or his successor may seem proper."

The Archbishop of New York, in a Pastoral Instruction, 1909, added that four members of a board consisting of five members were required for a quorum.

*"Essentials of a Corporation.*—The holding of the meeting, the election of trustees, and the execution of the certificate in accordance with the statute, constitute the substantial requirements to create a corporation, although the recording is necessary to its complete consummation. An error in recording the loss of one or more seals after they were legally and properly affixed, would not prevent the corporation from taking effect as such." <sup>88</sup>

"The validity of the incorporation of a religious society cannot be drawn in question by a private suitor in a collateral proceeding.

<sup>88</sup> Trustees St. Jacob's Church v. Bly, 73 N. Y. 323 (Lincoln, l. c., 606).



The appropriate remedy is by writ *quo warranto* at the suit of the attorney general, or perhaps a prosecuting attorney.”<sup>89</sup>

“The only and primary object of the corporation is the acquisition and taking care of property. The rules of the church as to the discipline of members have no relation to the corporate property or corporate matters.”<sup>90</sup>

f) Corporations are generally allowed to *acquire and hold property* by subscription, purchase, devise, or gift.<sup>91</sup> But some limits have been put on corporations in this regard, one of which is that the property held should not exceed the purpose for which the corporation was formed. “The question whether a religious corporation has capacity to take property in excess of the amount prescribed by its charter, can be raised only by the State in a direct proceeding for that purpose. The question cannot be raised collaterally at the instance of a private individual who may be interested in the property, nor in a pro-

<sup>89</sup> *Klix v. St. Stanislaus Church*, 137 Mo. App. 347 (Lincoln, *ib.*).

<sup>90</sup> *Sale v. First Regular Baptist Church*, Mason City, 62 Ia. 26 (Lincoln, *l. c.*, 610).

<sup>91</sup> Revised Statutes of Mo., 1909, sect. 3443; *Bolles, l. c.*, IV, 862.

ceeding for the construction of a will.”<sup>92</sup> But “a society organized for religious purposes under the *Ohio* statute could not lawfully establish a savings bank and engage in the general business of banking. Such business was not authorized by its charter.”<sup>93</sup>

“If a corporation takes land by grant or devise, in trust or otherwise, which, by its charter, it cannot hold, its title is good as against third persons and strangers; and the State alone can interfere. If the corporation exceeds the prescribed amount, though it be by an original purchase, nobody but the State can interfere with the holding of the property which it acquires, and it is a matter of which individuals cannot avail themselves in any way.”<sup>94</sup>

“*A promissory note* purporting to be made by the corporation and signed by its president, secretary, and treasurer was held not enforceable (against the corporation) without proof that the note was made by authority of

<sup>92</sup> *Hanson v. Little Sisters of the Poor, Baltimore and St. Mary's Church, Hampden*, 79 Md. 434 (Lincoln, *l. c.*, 600).

<sup>93</sup> *Huber v. German Congregation*, 16 Ohio St. 371 (Lincoln, *l. c.*, 599).

<sup>94</sup> *De Camp v. Dobbins*, 29 N. J. Eq. 36 (Lincoln, *l. c.*, 611).

the corporation. Trustees have no power to bind the corporation by individual action, but the board must act as a body.”<sup>95</sup>

“A religious association, although by reason of irregularities in complying with the provisions of the respective State’s Statutes it has failed to become a corporation, may nevertheless hold property given to it by the name which it assumed, and another religious society subsequently incorporated, is not entitled to take the name or the property.”<sup>96</sup>

g) Hence it was held that even if the certificate of incorporation was defective in some particulars, the society became a *de facto corporation*, and it might be presumed that all the requirements of the statute were complied with. “A bequest made to a corporation which had thus existed *de facto* for nearly twenty years, was adjudged to it.”<sup>97</sup>

As to the *name* of a corporation, there is a very interesting decision of a Pennsylvania

<sup>95</sup> People’s Bank v. St. Anthony’s Church, 109 N. Y. 512 (Lincoln, *l. c.*, 611); Dennison v. Austin, 15 Wis. 334 (Lincoln, *l. c.*).

<sup>96</sup> Glendale Union Christian Society v. Brown, 109 Mass. 163 (Lincoln, *l. c.*, 604).

<sup>97</sup> Chittendon v. Chittendon, 1 Am. L. R. (N. Y.) 538 (Lincoln, *l. c.*).

court concerning a schismatic Polish congregation which had usurped a name reserved to the Roman Catholic Church. The charter was refused.<sup>98</sup>

h) Where there is a definite body in a corporation—trustees—the majority of that body must not only exist at the time when any act is to be done by them, but a majority of that body must attend the assembly where the act is to be done.<sup>99</sup>

i) *Liability of Members of Religious or Charitable Corporations.* "Religious or charitable corporations have no capital stock and are usually dependent upon personal contributions for their support. Members of such organizations may and often do make themselves personally responsible for the payment of the corporate expenses and debts. Where, however, no contract has been made between the stockholders,—or more accurately speaking the members,—of such corporations, and the creditors of the organization, courts of equity will deal with the corporation

<sup>98</sup> *Re Charter Church of Mother of God, Czenstochowa*, 5 Lack. Leg. N. (Pa.) 128 (Lincoln, *l. c.*, 612 f.).

<sup>99</sup> *Moore v. Rector St. Thomas*, 4 Abb. N. C. (N. Y.) 51 (Lincoln, *l. c.*, 615),

and its members in a manner most calculated to further the ends of justice. For example, the members of a church duly incorporated as such, but of course without any capital stock, as is usual in such instances, have been held individually liable for the pastor's salary."<sup>100</sup>

j) The *dissolution* or end of a corporation is effected by the expiration of the time fixed by the statute as the life of the corporation.<sup>101</sup> But it may also be ended by a positive law of the State, although this may be contrary to church discipline, for "no church discipline can supersede the law of the State."<sup>102</sup> This latter disposition is, of course, to be understood of the end of the corporation as such, not of the end of the parish as such; because the State would not attempt to dissolve a parish or congregation which claims no corporate rights.

k) Finally it may be stated that the

<sup>100</sup> *Bigelow v. Congregational Society* 15 Vt., 370.

<sup>101</sup> *Sheehy v. Blake*, 46 N. W. Rep. (Wis.) 537. Both these decisions are quoted in *American Extension University*, published by A. C. Burnham, 1921, page 78.

<sup>102</sup> *Harlem Presbyterian Church* N. Y. 5 Hun. (N. Y.) 442 (Lincoln, l. c., 613).

property of a religious corporation is not exempt from assessment for local improvements.

### 5. *Transfer of Church Property*

Our American courts, as a rule, have accepted the view that "the canons of the Roman Catholic Church provide and require that the title to the property of the Roman Catholic congregation which is under the jurisdiction of the Roman Catholic bishop of the diocese in which the congregation has its place of worship, must be in the ordinary, or in the bishop of the diocese,"<sup>103</sup> or "to be conveyed to the bishop, his heirs or assigns forever, to be held by him in trust for the uses for which it was acquired."<sup>104</sup> This was called *fee simple*, or an unlimited estate in land descendible to a man's heirs generally.<sup>105</sup> However, although there might have been danger that church property could have been estranged from its purpose, yet the courts rather adopted the view that this was not fee

<sup>103</sup> *Krauczunas v. Hoban*, 221 Pa. 213 (Lincoln, l. c., 681).

<sup>104</sup> *Mannix v. Purcell*, 46 Ohio St. 102 (Lincoln, l. c., 682).

<sup>105</sup> *Blackstone-Cooley*, l. c., II, 106.



simple, but property held in trust, and hence to be retained to its real purpose.

A case may illustrate this practice. It turns about the transfer of the title to diocesan property to a coadjutor bishop.<sup>106</sup>

There is nothing in the civil law in this country which prevents or hinders the proper succession, for church purposes, of the title to church property carried in the name of the bishop of a diocese. The Constitution and laws of the States of the U. S. contain no special provision preventing the title to property dedicated to pious or religious purposes being carried in the name of a bishop or other church officers. Some States have a provision in the constitution and statutes authorizing churches, religions, and congregations to incorporate for the purpose of holding real estate. Such statutes are usually not mandatory, but permissive. In some of these States, such as Missouri, a corporation organized under statutes providing for church corporation may hold the title to property for certain purposes only, as for church edifices, parsonages,

<sup>106</sup> The author acknowledges with thanks this contribution of J. D. McNeely, L.L.B., of the Missouri Bar.

and cemeteries. In this last mentioned class of States educational and charitable organizations may be separately incorporated as educational or charitable corporations and controlled by the church authorities or religious societies, as the case may be.<sup>107</sup> In case there is no incorporation, as above specifically mentioned, the titles to all property dedicated to pious uses, and all deeds and grants to religious societies, are governed by the "common law," that is to say, by those principles, usages and rules which have prevailed in England and the United States, and which do not rest for their authority upon any statute enacted by legislature.

Although the Church is for many purposes recognized as a legal personality and a devise or bequest to the "Catholic Church" for religious or charitable purposes will not, under the English or American law, be permitted to fail for lack of formal incorpora-

<sup>107</sup> 34 *Cyclopedia of Law and Procedure*, 1116; Constitution of Mo., Art. 2, Section 8; Revised Statutes of Mo., 1919, chap. 90, art. II, sect. 10264; *Smith c. Bonhoot*, 2 Mich. 115; *Howard v. Hayward*, 10 Metc. (Mass.) 408; *Proctor v. Board of Trustees*, 225 Mo. 51; *Catholic Church v. Tobbein*, 82 Mo. 51; *Lilly v. Tobbein*, 103 Mo. 477.

tion,<sup>108</sup> still, under the common law, as the church was not incorporated as a body capable of holding an estate in lands, it became the custom for the rector to represent it, to take upon himself the person of the church, and as such to become seized of the church property, including the glebe, the church edifice, titles and obligations; *but he was seized only in right of the church and had no power of alienation beyond the time of his ministry*, and therefore, on his resignation, death or deprivation, the freehold was said to be in abeyance until his successor was inducted into office.<sup>109</sup>

The title to real estate vested in the bishop of a diocese "and his successors in office" vests in him only in his official capacity, and even in the absence of a precautionary will, it seems that property so conveyed and held

<sup>108</sup> 34 *Cyclopedia of Law and Procedure*, 1153; *Steinhauser v. Order of St. Benedict*, 194 Fed. 289, 114 C. C. A. 249; *Terrett v. Taylor* (1815), 9 Cranch, 43, 3 L. ed. 650; *Ponce v. Roman Catholic Church*, 210 U. S. 295, 52 L. ed. 1068; *Lilly v. Tobbein*, 103 Mo. 477.

<sup>109</sup> *Cyc. cit.*, 1153; *Newmarket v. Smart*, 45 N. H. 87; *Pawlet v. Clark*, 9 Cranch (U. S.) 292, 3 L. ed. 735; *Terrett v. Taylor*, 9 Cranch (U. S.) 43, 3 L. ed. 650.

does not, on his death, go to his personal heirs, but passes to his successor in office.

"A deed to a bishop for the benefit of the church and to his successors and assigns forever vests a fee simple title (meaning a good title) in such bishop, in trust for the church, in the absence of any condition subsequent, express or implied." <sup>110</sup>

But a deed conveying real estate to certain named individuals, not as trustees of any incorporated religious society, nor to their successors in office, has been held not to pass the title to parties who claim to be such successors. <sup>111</sup>

The official action of the church authorities exclusively (*i. e.*, the Pope in this case) is looked to by the civil law in determining

<sup>110</sup> 34 Cyc. 1156, Note 95 & 96.

Antones v. Eslava, 9 Porter (Ala.) 527.

Methodist Society v. Bennett, 39 Conn. 293.

Church of Redemption v. Grace Church, 6 Hunn. (N. Y.) 166.

Fitzpatrick v. Fitzgerald, 13 Gray (Mass.) 400.

Beckwith v. St. Phillip's Parish, 69 Ga. 564.

Moore v. Gross, 54 Iowa 248. 6 N. W. 290.

Scott v. Thompson, 21 Iowa, 599.

<sup>111</sup> 34 Cyc. 1154, Note 78; Isaac v. Emory, 64 Md. 333, 1 Atl.

who has the lawful right to succession to the office of bishop, and consequently the lawful right of succession to the title of church real estate held by him as bishop.<sup>112</sup>

When the bishop is wholly incapacitated and a coadjutor bishop has been duly appointed and installed, and has the right of succession under the ecclesiastical law, his status as coadjutor with the right of succession is recognized by the courts under the law, and such rights as may thereby be conferred upon him *in re administratio familiaris* relative to church revenue and church property will be recognized and enforced by the civil courts.<sup>113</sup>

In the case of *Babert v. Olcot*, 86 Texas 121, 126, 23 S. W. 985, where Coadjutor Bishop Gallagher, acting under a power of attorney for Bishop Dubuis, conveyed certain

<sup>112</sup> *Draper et al. v. Minor et al.*, 36 Mo. 290; *Bouvier's Law Dict.*, 3rd ed., Vol. I, p. 365; *Bonacum V. Harrington*, 65 Neb. 831, 91 N. W. 886; *Pounder v. Ashe*, 44 Neb. 673, N. W. 48; 34 Cyc. 1143.

<sup>113</sup> Citations, *supra*. "A coadjutor bishop has been defined in law to be "the assistant of a bishop." *Bouvier's Dict.*—"One who is appointed to perform the functions of a regular bishop who is old and infirm." *Century Dictionary*.—"One appointed to assist a bishop, being grown old and infirm so as not be able to perform his duties." 7 Cyc. 265.—*Blanc v. Aglesbury* 63 Tex. 489.



real estate, the court said: "The members of the Roman Catholic communion are found in every part of the Christian world, and their interests, temporal and spiritual, are looked after by a well disciplined hierarchy, consisting of functionaries of successive grades, whose respective powers are accurately defined, and among themselves, well understood. In such a case, in the absence of proof to the contrary, the presumption that everything has been rightfully done ought to apply with peculiar force. We therefore conclude that Bishop Dubuis was authorized to make the deed to the plaintiff, through which he claims title to the lots in controversy. Being invested with the legal title, he could convey through an attorney: and it may be that, without such authority, Gallagher, as Coadjutor Bishop, had the power to make the conveyance. A coadjutor bishop is one who is appointed to perform the functions of a regular bishop who is old and infirm. See word in *Century Dictionary*. In the deed, Gallagher is also styled "administrator bishop," and we think it is to be inferred that he was charged, as the Coadjutor of Dubuis, with the adminis-



tration of the affairs of the see. Bishop Dubuis held the legal title to the lots in trust, and it was at all events competent for him to convey that title by attorney."

Where a right of property asserted in a civil court is dependent on a question of doctrine, discipline, ecclesiastical law, rule, custom, or church government, and that question has been decided by the highest tribunal within the organization, to which it has been regularly and properly carried, the civil courts will accept that decision as conclusive, and be governed by it in its application to the case before it.<sup>114</sup>

But in societies like those of the Congregational and Baptist denominations, which have no organic connection with any external ecclesiastical body, the will of the majority, when duly and regularly expressed through the appointed channels of the society, ordinarily prevails, and this is true not only in the domain of ecclesiastical concerns, over which the civil courts have no jurisdic-

<sup>114</sup>*Brown v. Clark*, 129 Ga. I, 58 S. E. 181; 24 Law Reports Annotated (New Series), 675; *St. Vincent's Parish v. Murphy*, 83 Neb. 630; 120 N. W. 187; 35 L. R. A. (New Series) 919; also 35 *Ibid.*, 926.

tion, but also when its action or decision directly or indirectly affects civil or property rights over which the civil courts do have jurisdiction.<sup>115</sup>

It therefore follows that, in all matters affecting church property, the civil courts will follow church laws and decrees in determining the official rights of the coadjutor bishop in the event of the disability of the bishop.

<sup>115</sup> 8 American Law Reports, Annotated, L. C., 108.

## CHAPTER III

### CHANGE OF PARISHES

A change in the actual condition of a parish may be brought about by union, transfer, division, dismemberment, transformation, or suppression. Such a change has always been looked upon as an *innovation* which should not be made except for a just cause (*iustâ causâ*). The canonists treat changes of benefices, and more particularly division and dismembration, from the viewpoint of alienation. This was, and still is, quite intelligible, inasmuch as both division and dismembration are connected with a change of property and ecclesiastical revenues. Hence the reasons were, in general, summed up as two: urgent necessity (*urgens necessitas*) and evident utility (*evidens utilitas*).<sup>1</sup>

<sup>1</sup> See c. 2, Clem. III, 4; c. un. "*Ambitiosae*," Extrav. Commun. III, 4; Phillips, *Kirchenrecht*, VII, I, 298; Wernz, *Ius Decretalium*, II, page 369; Gyr, *l. c.*, 53 ff.

## SECTION I

## UNION OF PARISHES

I. *Various Kinds of Union*<sup>2</sup>

Union, in general, is a joining of two or more juridical entities (benefices), made by competent authority for reasons, and with due observance of the formalities prescribed by ecclesiastical law. It is looked upon as a sort of suppression or extinction of a benefice, *viz.*, of the one which is joined to another. Quite natural, for the passive benefice ceases to exist juridically, at least in the union called extinctive.

Can. 1419 mentions *three kinds* of union:

(a) *Extinctiva* or *per confusionem*, when out of two or more suppressed benefices an entirely new one is created, or when two or more benefices are combined with a third so that they cease entirely to exist as juridical entities. The *effect* of such a union is, as can. 1420, § 1 says, that the new benefice as-

<sup>2</sup> The former commentators, as, for instance, Engel, Reiffenstuel, Boekhn, treat of this subject under lib. III, tit. 12; Fagnani in cap. 1 Novit., III, 9; Garzia, *Tractatus de Beneficiis Eccl.*, Venet., 1630, Vol. II, pp. 406 ff.

sumes all the rights and obligations of the suppressed or united benefices. If, however, these rights and obligations conflict, only the more important and favorable ones are to be retained. The *meliora* of the text are such as affect the spiritual and temporal elements of the benefice.<sup>3</sup> Thus divine worship should not be curtailed, so far as it does not conflict with parochial duties. But strict duties prevail. The temporal emoluments which are safer and less encumbered are preferred to an uncertain income and burdened or obligated revenues. The *favorabiliora* are those which benefit the holder of the new benefice. However, it is to be noted that, if a reduction of Mass obligations is desirable, such a composition can only be made by the Apostolic See.<sup>4</sup>

(b) A union is called *aeque principalis* if two or more benefices, though united, remain as before, neither being subordinated to the other. In this case each benefice retains its nature, rights, and obligations, but one and the same cleric may hold title to all. This

<sup>3</sup> Blat, *De Rebus*, p. 395.

<sup>4</sup> Can. 1551.

is somewhat like a personal union known in civil law, as, for instance, the former dual monarchy of Austria-Hungary. The boundaries of two parishes thus united remain distinct, both have their church, the revenues and taxes remain distinct, and separate books are kept for each parish. But the pastor has the obligation of saying one Mass for both parishes when obliged according to can. 466. In this case, therefore, there is, properly speaking, no amalgamation of two benefices and no overlapping, extinction, or confusion.

(c) *Minus principalis* is a union *per subiectionem* or *per accessionem*, in which the several benefices remain, but one is made subject or accessory to the other. In this case the accessory follows the principal benefice, upon which it depends, so that the clergyman who obtains the principal, *eo ipso* receives also the accessory benefice, and is bound to comply with the obligations incumbent on both. However, the fulfillment of such duties, though inherent in the holder, does not mean that he cannot comply with them by means of a substitute. But if the accessory benefice attached to a principal one requires



residence, the substitute must reside there. Canon 1419, § 3 says: *beneficia remanent, i. e.*, they retain their juridical entity. This appears like a new construction of the former doctrine. For if we understand the commentators of the Decretals aright, it was maintained that the accessory benefice was changed in its status to such a degree that it ceased to be a distinct entity, and was rather considered part and parcel of the principal benefice.<sup>5</sup> However, both views may easily be combined by saying that the accessory is a distinct part of the principal. Consequently, the *regula iuris* 42 in *Sexto*: "*Accessorium naturam sequi congruit principalis*" finds its application here. If the principal benefice is one of advowson, the accessory also becomes such; if the principal is a religious benefice, the accessory is also a religious benefice. But not *vice versa*; for the principal draws the accessory, not conversely. It seems to us that the S. Congregation had such a union in view

<sup>5</sup> Thus Reiffenstuel, III, 12, n. 45, says: "*Per hanc accessoriam unionem mutatur status et natura beneficii uniti, adeo ut, licet antea fuerit ecclesiasticum beneficium per se subsistens, per unionem praedictam desinat esse talis, et fiat pars alterius cui unitum fuit.*" Cfr. Garzia, l. c., XII, cap. 2, n. 12 ff.

when it advised our American bishops to create subsidiary parishes or chaplaincies within the boundaries of existing parishes wherever lack of endowment or shifting of the population do not permit the erection of parishes proper.<sup>6</sup> Such accessory benefices—benefice here taken in a wider sense—might be considered the so-called missions or stations attended by a pastor, who in that case enjoys all the rights and has all the obligations connected both with his parish and with the missions or stations. We say: *might* be considered. For, frankly, this seems not to be the case in every instance, at least not with regard to missions attended by a *religious house*. Take, to speak concretely, a Benedictine monastery or any clerical religious community. There is the abbey parish incorporated *pleno iure* with the abbey. There are also some missions attended by Fathers from the monastery; these are not incorporated with the abbey, but only *concreditae*, as the Code would say, *i. e.*, given in charge of the community. The notion of “benefice”

<sup>6</sup> S. C. C. Consistorialis, Aug. 1, 1919 (*Eccl. Review*, Vol. 61, p. 551).

(can. 1409) is wanting in more than one sense. The question naturally arises: are these accessory entities attached to the abbey *church* or to the abbey? If to the church, then the actual pastor of the abbey church is the incumbent of these missions; he enjoys parochial rights in all these missions; the *excurrentes* must give an account to him. If, on the contrary, these missions and stations are simply connected with the *abbey* as such, then the *excurrentes* are in no way accountable to the pastor of the abbey church,—which, of course, we suppose to be at the same time a parish church. What, then, is the canonical status of these missions? It is difficult to classify them. They are neither parishes nor quasi-parishes (can. 216), nor are they churches governed by rectors, because can. 479, § 1 expressly excludes them from this category. Not infrequently it happens that these missions or stations have either no boundaries at all or very vague ones. And yet can. 216 demands that the diocese be divided into parishes. There is nothing else to be done but to make accessory “benefices,” subsidiary parishes or chaplaincies of such

missions and attach them to an adjoining legally or canonically established parish, whose pastor will then hold title also to this accessory "benefice." To this pastor the *excurrents* are responsible, and he is responsible for the proper administration of both the temporalities and spiritualities.

We are aware that so far the bishops have created little or no difficulties, but simply granted the diocesan faculties on the strength of which the *excurrentes* performed all parochial functions, as if they were pastors. Although this procedure was and perhaps still is, excusable, especially as long as ours was considered a missionary country, and as long as can. 216 was or is not carried into effect, yet it cannot be said to conform to the Code, which requires strictly territorial organization (can. 216).

## 2. *Competent Authority*

1. The *Pope* can unite, not only dioceses, but parishes in any part of the world.<sup>7</sup> However, in countries where concordats reg-

<sup>7</sup> See c. 2, in 6°, III, 4; c. 1, Clem. III, 5.

ulate the relations between the civil government and the Apostolic See, the latter will always proceed in union with the civil government, if and as far as such a change touches civil matters or territorial circumstances.<sup>8</sup> On the other hand, it must be stated that if our country should acquire territory that is subject to a concordat, our government cannot set aside such a concordat on the plea that there is separation between Church and State here at home.

2. *Local Ordinaries*, says can. 1423, may unite any kind of parishes, either *aeque* or *minus principaliter*, with one another or with a non-curate benefice, provided they are in the *same diocese*. For can. 1424 expressly forbids a union of parishes or benefices which are located in different dioceses, even in cases where the same bishop governs two dioceses *aeque principaliter*.

If the bishop wishes to unite a parish with a non-curate benefice, *viz.*, one which has no

<sup>8</sup> The stereotyped term is: "*in hac re perficienda cum gubernio erunt ineunda consilia, ubi et quatenus civilium rerum rationes sint conciliandae*"; cf. Concordat with Nicaragua, art. XI; with Salvador, art. XI, in *Raccolta di Concordati*, 1919 (ed. Mercati), pp. 954, 965, etc.

care of souls attached to it, he must make the union in such a way that the non-curate benefice becomes the accessory to the parish or curate benefice. Here is an illustration: There were three benefices in a parish at Modena, two of them had an income of \$4.10, with a burden of 36 Masses each (this precisely constituted the nature of the non-curate benefice, *viz.*, to say 36 Masses a year) and the third had an income of \$1.34 a year with an obligation of three annual Masses. The bishop, therefore, was free to unite these three non-curate benefices with the parish of St. Pancratius, and the only reason why he asked Rome for permission was because there was a reduction of Masses involved.<sup>9</sup>

Local Ordinaries may also unite a *parish* with a *cathedral or collegiate church* which is located within the territory of that parish, so that the revenues may accrue to the cathedral or collegiate church, provided, however, that the pastor or vicar receive a sufficient support.

<sup>9</sup> S. C. C., in Mutinensi, Nov. 1791 (Zamboni, *Collectio*, 1860, I, page 227, n. 31); see *Conc. Trid.*, Sess. 21, cap. 5, *de Ref.*



A *cathedral* church is one in which the bishop and his chapter reside. The same holds also concerning a pro-cathedral, at least if analogy is admitted. A *collegiate* church is one which has a chapter of canons, but is not the episcopal church.

The text requires that the cathedral or collegiate church to which a parish is to be united must be *located within the boundaries of the parish* which is to be united with it. The reason for this provision must be sought in the strict demand of the law of territorial organization, in the convenience of service, and also in a possible conflict of rights.<sup>10</sup>

The *congrua* or decent support is to be given to the pastor or vicar. For if the union is only an incomplete one, *viz.*, as to material emolument (*ad temporalia tantum*), the one who takes care of the parish is really the pastor (*parochus*, not merely *vicarius*) of the cathedral or collegiate chapter, although responsible to the latter for all material revenues attached to the parish. If the union is made as to both the spiritual

<sup>10</sup> Concerning the relation between chapter and pastor, see can. 415.

and temporal, the priest employed at the united parish is the *vicarius* or actual pastor of the parish, whilst the cathedral or collegiate chapter is the habitual pastor. In the former case, *viz.*, if the union is only *quoad temporalia*, the priest who has to fill the place of pastor is taken from among the diocesan clergy, while the institution or appointment proper belongs to the local Ordinary. But if the union is *quoad temporalia et spiritualia*, the *vicarius* is selected from among the members of the cathedral or collegiate chapter or religious community and presented to the bishop for approval; for the bishop cannot refuse institution if the candidate presented is found fit.<sup>11</sup> In neither case need a *concursum* take place, certainly not if a mere *minus principalis* union is effected.<sup>12</sup> Although two parishes may be united only *accessorie*, yet the service in either of them is not to be diminished. Much less is a diminution of divine worship allowed if an *unio aequae principalis* is made.<sup>13</sup>

<sup>11</sup> See can. 471, § 2.

<sup>12</sup> Reiffenstuel l. III, tit. 12, n. 49; can. 459, § 4 may not be alleged to the contrary.

<sup>13</sup> Garzia, l. c., P. XII, cap. 2, n. 35; Reiffenstuel, l. c., n. 50.

Here in our country the cathedral churches are, as a rule, also parish churches. However, this status can hardly be called a union, unless we take it as some kind of a *fictio iuris*, whereby we imagine, in *abstracto*, a cathedral to which a parish church is united. But this, so far as we know, was or is not the case. On the other hand, the law, when treating of unions, has in view two distinct juridical entities (*per se subsistentes*) existing here and now, or at least in future. Besides we have no cathedral chapters, wherefore the union would rather appear like a personal one.

In canons 1423 and 1424 are mentioned *unions which the local Ordinary cannot make*.

a) The bishop cannot unite a parish with the *mensa capitularis* or *episcopalis*. By *mensa*, as stated elsewhere,<sup>14</sup> are meant the revenues or endowment of the chapter or of the bishop himself. This canon is a repetition of the decree of the Council of Trent

<sup>14</sup> See our *Rights and Duties of Ordinaries*, 1924, page 47. "*Mensam episcopalem constituent Curiae emolumenta et ceterae oblationes, quae a fidelibus, in quorum bonum dioeceseos erecta est, praeberi solent*"; Pius XI, "*Universalis Ecclesiae*", in *Lancastrensi*, Nov. 22, 1924 (A. Ap. S., 1925, Vol. XVII, 130).

aimed at the neglect of pastoral duties, which was one of the evils of that time.

b) Parishes may not be united with *monasteries, churches of religious, or any other juridical person*. The Council of Trent excluded also hospitals and *militiae*.<sup>15</sup> Hospitals, in fact all juridical entities, either collegiate or non-collegiate, are excluded from the right of the bishop to unite them with parishes.<sup>16</sup>

c) Parishes may *not be united* with the dignities and benefices of *cathedrals and collegiate churches*, which might easily lead to a forbidden cumulation of benefices. Here is understood personal union with the dignitaries or prebendaries; a union with a cathedral or collegiate church is expressly permitted.

d) The bishop has no power to unite a benefice which is of *iuspatronatus* with one

<sup>15</sup> Sess. 24, cap. 13, *de Ref.*, which simply excludes *curata* benefices of every description. *Militiae* were hospices or stations of the Knights of Malta.

<sup>16</sup> This we infer from can. 99.—Rather obscure is Blat's comment, *l. c.*, page 399.

which is of free collation, because of the possibility of an ensuing conflict of rights.<sup>17</sup>

e) For the same reason the Code also excludes a union of exempt benefices or benefices *reserved* to the *Apostolic See* with benefices not exempt or reserved. If the text says *exempt*, it means exemption in the full sense, *viz.*, local and personal, or, in other words, a parish or benefice which is fully exempt from the jurisdiction of the local Ordinary. An exemption of this kind is not attached to a parish *pleno iure* united with a monastery, for even after such an incorporation the parish remains under the jurisdiction of the local Ordinary.<sup>18</sup> The consequence is that even religious parishes can be united, since can. 1423, § 1 says, "*quaslibet ecclesias paroeciales.*"<sup>19</sup> Concerning reserved parishes hardly anything need be added, for they are now few and certainly rare in our country.<sup>20</sup>

<sup>17</sup> Reiffenstuel, *l. c.*, n. 55.

<sup>18</sup> See can. 631.

<sup>19</sup> Thus also Blat, *l. c.*, page 398.

<sup>20</sup> It is hardly necessary to observe that former canonists permitted a limited union of even exempt or reserved benefices; Reiffenstuel, *l. c.*, n. 56; the Code excludes all without limitation or restriction.

3. The Code (can. 1423, § 1) rules that only local Ordinaries can unite parishes, with the restrictions thus far stated. The *Vicar Capitular cannot make any such unions*, except, of course, he is empowered thereto by the Apostolic See,—and therefore the teaching of the older canonists must be relinquished.<sup>21</sup>

The *Vicar-General*, says the Code, needs a special mandate to enable him licitly and validly to unite benefices or parishes. He needs such a mandate even if the bishop has given him general powers (*sub clausula generali ad omnia*).<sup>22</sup>

4. The *Apostolic Delegate*, by his general faculties issued May 6, 1919, has *no power* to perform such unions, nor is any right granted with regard to other acts connected with this matter.<sup>23</sup> This is here stated because canonists used to vindicate this right to the *legati a latere*.<sup>24</sup> But their powers must now be judged from their credentials.

<sup>21</sup> Cfr. Garzia, *l. c.*, n. 64; Reiffenstuel, *l. c.*, 67.

<sup>22</sup> Garzia, *l. c.*, n. 69.

<sup>23</sup> See our *Commentary*, Vol. I, ed. 4, Appendix.

<sup>24</sup> Garzia, *l. c.*, n. 65; Reiffenstuel, *l. c.*, n. 63.



### 3. *Reasons and Formalities Required for a Union of Parishes*

1. The Code (can. 1423, § 1) gives two reasons that justify a union of parishes, *viz.*, necessity or great and evident utility.<sup>25</sup> Concerning necessity, the decisions generally allege poverty either of one or both parishes, or the needs of the cathedral.<sup>26</sup> Such a case would exist in cities where the white population recedes from the colored, or the Catholic population has to give way to a strange element, or in general for reasons of industrial movements. Cases of *great and evident utility* are rather rare, as far as we were able to search the sources: the welfare of souls, the increment of divine worship, a great saving of expenses, which now often leads to centralization, more effective pastoral administration, etc. These reasons must exist before the decree of union is issued. Former canonists are rather explicit about the cognition and exist-

<sup>25</sup> See c. 3, X, III, 5: "*evidens necessitas vel utilitas*"; *Conc. Trid.*, Sess. 7, cap. 6, *de Ref.*: "*ex legitimis aut alias rationabilibus causis*."

<sup>26</sup> See Richter-Schulte, *Trid.*, 1859, ad Sess. 21, cap. 21, *de Ref.*; Zamboni, *Collectio S. C. Concilii*, Vol. I, 224 ff.

ence of these reasons and unanimous in saying that a union made without a canonical reason would be null and void.<sup>27</sup> This is true. For the local Ordinary is bound by, and cannot validly act against, the law. Therefore the canonists also demand proofs for the existence of such reasons.<sup>28</sup> Consequently the bishop should gather the necessary proofs in order to convince himself of the necessity or evident utility of the proposed union.

2. The *formalities* required are thus stated in the Code:

(a) The local Ordinary must, above all, ask the *advice of his chapter*, or, with us, of the diocesan consultors (can. 1428, § 1). If he omits this formality, he acts invalidly, as per can. 105. He is not obliged to follow the advice of the consultors, but he must ask all of them *collegialiter, viz.*, as a body. It is not necessary that all be present; a quorum suffices, provided all have been summoned.<sup>29</sup>

<sup>27</sup> Garzia, *l. c.*, n. 113 ff.: "*unio facta per Ordinarium sine causa vel ex causa falsa, etiam servata iuris forma, est nulla ipso iure.*"

<sup>28</sup> See can. 84, § 1; can. 1428, § 2; Garzia, *l. c.*, n. 120 ff.

<sup>29</sup> See can. 162, which rules that, if more than two-thirds of the chapter members have been overlooked, the election, and

(b) Can. 1428 also demands that those *interested* in the matter be heard, especially the *rectors* of the respective churches. Can. 1424 says that "Ordinaries never can unite either curate or non-curate benefices *against the will of the present holders*, who would thereby suffer damage." Consequently the bishop cannot unite religious parishes if the religious superior protests against the union. Neither can he unite two secular parishes if the actual holder of one or both parishes would really suffer a detriment. Any attempt contrary to this disposition of the law is null and void.

Must the *parishioners* also be heard? "*Quorum intersit*" would seem to include the parishioners, and doubtless what some older canonists<sup>30</sup> said concerning the advisability of hearing the parishioners holds good in our country, where they bear the financial burden. The bishop should protect the interests of the people and listen to reasonable remonstrances.

(c) Can. 1428, § 1 demands that the union

therefore the act, is null and void. Formerly the *consent* of the chapter was required.

<sup>30</sup> Reiffenstuel, *l. c.*, III, 12, n. 76.

be made by an *authentic document* or writing, which implies the signature of the Ordinary and the diocesan seal.

(d) What is said in can. 1428, § 2: Local Ordinaries can only make *perpetual unions*, not merely temporary ones, in order to avoid the forbidden cumulation or plurality of benefices,<sup>31</sup> must be considered as a strict formality. For a temporary union might easily turn into a personal one with a nepotistic tendency.

## SECTION II

### DIVISION AND DISMEMBRATION

#### 1. *Definition*

The Code, in can. 1421, explains a division of benefices as being made if two or more benefices are created out of one. This really means establishing a new parish or a juridical entity which did not exist as such before.

<sup>31</sup> See can. 156; can. 1439; can. 2396.

Thus if one well defined parish is split into two, each having a residential priest, an endowment, and fixed boundaries, there are two non-collegiate bodies distinct from one another, while before the division there was only one juridical body.

*Dismembration* takes place when a part of the territory or the revenues belonging to one benefice is taken away and united to another benefice, or to a charitable or ecclesiastical institution. This act does not produce two distinct entities or parishes, but supposes them as already existing. Such a dismembration might become necessary, for instance, in a city, on account of the shifting of the population, or a notable decrease in the revenues of a parish. However, this last named reason must be properly interpreted.<sup>32</sup>

## 2. *The Competent Authority*

What was said above concerning the erection of parishes also applies at least to some extent to division and dismembration. We

<sup>32</sup> Sometimes the term *dismembratio* is used to signify division and sometimes the authors employ both expressions promiscuously; see, for instance, Bouix, *De Parocho*, Paris, 1855, p. 244.

say, "at least to some extent," because of a doubt that may arise whether the Vicar Capitular and the Vicar General are competent to divide parishes. For the text of can. 1427, § 1 simply says: *possunt etiam Ordinarii dividere*, without the addition mentioned in can. 1423. Did the Code omit this phrase purposely, so that the meaning would be: the Vicar Capitular (administrator) during the vacancy of the episcopal see, may validly and licitly divide parishes without a special mandate? We believe that by simply mentioning "Ordinaries" without further qualification the legislator intended Ordinaries as determined in can. 1423, § 1. Therefore, the Vicar Capitular is not entitled to make a division at all, especially on account of can. 436, while the Vicar General needs a special mandate. This was the former practice of the courts and the common teaching of the school.<sup>33</sup>

It may also be added, once for all, that a bishop who has in any legal way lost his

<sup>33</sup> See c. 9, Dist. 1 de consecr.; X, III, 9; 6°, III, 8; Fagnani in cap. "*Ad audientiam*," III, 48, n. 41; Bouix, *De Parocho*, p. 278.



jurisdiction cannot validly or licitly perform a division or dismemberment of a parish. Neither can a bishop (even in case of transfer) validly or licitly perform such an act before having taken possession of his diocese.

The parishioners have no power to divide or dismember a parish, since they do not constitute a corporation in the ecclesiastical sense. Besides, even a parish corporation endowed with that character by the State needs a formal decree of the superior ecclesiastical authority for its establishment, consequently also for any essential change, such as is implied by a division.<sup>34</sup>

### 3. *Canonical Reasons for Dividing Parishes*

The Code in can. 1427, § 2 rules as follows: "The *sole canonical* reasons for dividing or dismembering a parish are: (a) great difficulty on the part of the people to come to the parish church, or (b) impossibility of properly attending to their spiritual needs because of a too great number of parishioners—pro-

<sup>34</sup> Gyr, *l. c.*, p. 136.

vided this latter deficiency cannot be remedied by assistant priests, in accordance with can. 476, § 1.

Can. 1428, § 2 adds: "any division or dismembration made without a canonical reason is *null and void*."

It is not superfluous to discuss these reasons somewhat more minutely, especially since there seems to be a tendency on the part of some bishops to increase the number of parishes in their dioceses beyond reasonable bounds.

(a) The Code admits only *two* reasons, *viz.*, either great difficulty (*magna difficultas*)<sup>35</sup> or a great number of parishioners whose spiritual welfare cannot be properly attended to even with the help of assistants. Either of these reasons is sufficient in itself to justify a division, so that they are not to be taken conjointly, but disjunctively.

A perusal of the decisions of the S. C. Concilii reveals the fact that the practice of the Roman Court was more rigid up to the year 1750 than it has been since. Consequently also the teaching of later canonists was not as

<sup>35</sup> See c. 3, X, III, 48; *Conc. Trid.*, Sess. XXI, cap. 4, *de Ref.*

rigorous as that of the earlier ones. But even granted this change towards a more lenient view, even the more recent decisions cannot be said to reflect an entirely uniform practice, the reason for which mutability depends on those set over the above-mentioned congregation. Here are some of its decisions.

(b) As to the *magna difficultas accedendi ad ecclesiam parochialem*,—this reason evidently includes distance as well as inconvenience, both of which are mentioned in the well known sources.<sup>36</sup> Concerning *distance*, it has been the almost uniform practice and teaching that 2,000 *passus* or two Roman miles suffice,<sup>37</sup> if a considerable number of the parishioners live at least  $1\frac{3}{4}$  English miles away from the parish church. Such a distance has been considered a sufficient cause for dividing a parish, according to the *The-saurus Resolutionum*.<sup>38</sup> Of course, mere distance is not a sufficient reason for dividing a

<sup>36</sup> See S. R. R., April 2, 1912 (*A. Ap. S.*, IV, 454).

<sup>37</sup> 1,000 *passus* are 5,000 Roman feet, or 1 Roman mile, or 4,850 English feet; consequently 2,000 *passus* are 9,700 English feet or  $1\frac{3}{4}$  of a mile; see Ramsay-Lanciani, *Manual of Roman Antiquities*, 1901, p. 462 f.

<sup>38</sup> Bouix, *De Parocho*, p. 263.

parish if only a few scattered families live along the road.

Distance alone may be a sufficient reason in city parishes or in closely connected villages, such as are found in Europe.<sup>39</sup> But to divide a rural parish that has barely 60 or 70 families merely on account of distance, is canonical nonsense, especially in our time when automobiles and relatively good roads almost annihilate distance.

The other reason that is attached to the "great difficulty of getting to the parish church" is *obstacles on the road*. From various cases proposed to the S. Congregation it may be gathered that by such obstacles are meant rough, rugged, dangerous, precipitous roads, especially when intersected by rivers that are either not bridged or are impassable, at least in the rainy or wintry season.<sup>40</sup> As

<sup>39</sup> S. R. R. in *Sedunensi*, A. Ap. S., IV, 450 ff., which deals with the 4 municipalities of Saas in Canton Wallis, Switzerland. In our country we have not many such closely connected towns. Certainly no parish can be formed of haystacks, barns, and cattle. Besides, even in cities, there may be, and really are, very few Catholics scattered over many blocks. To allege distance in this case is unsound reasoning.

<sup>40</sup> S. C. C., May 31, 1855; Dec. 20, 1856; March 31, 1860 (*Lingen-Reuss*, *Causae Selectae*, pp. 756 ff.); Pignatelli, *Consultationes*, III, Cons. 230, n. 9; A. Ap. S., l. c.

such an extrinsic obstacle might also be considered a dangerous railroad crossing.<sup>41</sup> It is not necessary, the canonists wisely say, to prove this hazardous condition by the fact that some children died without baptism or some adults without the Sacraments.<sup>42</sup> This may happen a few steps from the church-door without the priest's fault.

These are all the reasons which can be drawn from the text of the Code. We ask ourselves, with special regard to conditions in this country: Are there such obstacles in our cities? There are railroad crossings which are very dangerous, especially where there is neither an underground nor an overhead transit or viaduct, and there are many tracks and many trains running.

However, in most larger cities these dangers are either entirely removed or at least reasonably reduced. Besides, not infrequently the railroad tracks are so centralized that there is hardly room for a parish near or within a railroad center. Furthermore, the common use of automobiles makes access to parish

<sup>41</sup> Bouix, *l. c.*, p. 258.

<sup>42</sup> *Ibid.*

churches easy for people of all ages and conditions. In the U. S. there is now one motor vehicle to each 6.37 inhabitants, California being in the lead with one vehicle for each three inhabitants.<sup>43</sup>

The next canonical reason stated in the Code is "*nimia parochianorum multitudo*," an excessive number of parishioners. This reason is not an absolute one, but conditioned by the clause: "*quorum bono spirituali subveniri nequeat ad normam can. 476, § 1.*" This latter canon calls for *cooperatores* or assistants (curates), in a number commensurate to the spiritual needs of the parishioners. Rome has never decided the question as to how many parishioners would constitute "a too great number." Pius VI is said to have been surprised to find 6,000 persons congested in one parish in Paris.<sup>44</sup> But the S. Congregation which had to decide a case in 1905 was not so much surprised at 6,500 souls in a parish in Turin, because they were well cared for by Capuchin Fathers.<sup>45</sup> Hence it were a futile

<sup>43</sup> *Literary Digest*, March 14, 1925, p. 25.

<sup>44</sup> Bouix, *l. c.*, p. 256 f.

<sup>45</sup> S. C. C., Jan. 21, 1905; July 27, 1907. (*Cfr. our Commentary*, Vol. VI, 509 f.).



attempt to fix a precise number. The question is: When is the expedient of additional assistants to be abandoned? The answer is obvious; namely, when the pastor can no longer properly attend to the duties mentioned in can. 467 and 468, § 1. The text, "*oves suas cognoscere*" has been insisted upon in this connection.<sup>46</sup> This, indeed, is ordinarily almost impossible if a parish counts more than 1,000 families. A noteworthy statement was made by the Rota in giving a reason for the less rigid practice followed by the Roman Court in granting divisions, to wit: "*Ratio huius mitioris praxis est, quia hodie depravati mores incautae iuventutis, massonicae sectae quae veluti lupi rapaces furunt, ut Christi gregem devorent, nisi necessitatem absolutam, saltem utilitatem portendunt evidentem multiplicandi pastores. Intra populi pastores autem veros parochos praeferendos esse vicariis, nemo non videt.*"<sup>47</sup> This, in plain words, means that the Rota has left solid canonical ground.

Some writers add that pastors show more

<sup>46</sup> See Gyr, *l. c.*, page 78.

<sup>47</sup> *A. Ap. S.*, IV, 454.

zeal and charity for their parishioners (*"quia parochus ecclesiae suae sponsus et suarum ovium pastor"*) than assistants, who are less qualified *"ex eo quod a iure ceu mercenarii et imperiti habentur, ac male regulariter pas-cunt oves in proprietate non suas."*<sup>48</sup> Very flattering to assistants!

Our practical conclusion is that it depends on the bishop's sound judgment whether or not a pastor can do justice to his office with the help of assistants. A parish with 300 or 400 families living within a radius of a mile and a half, with convenient access to the parish church, requires no division if the pastor is helped by one or two assistants. Now-a-days especially, for financial and practical reasons, centralization is the tendency, not only as to schools, but also as to churches. Besides there is great saving of man-power with regard to parochial schools. Lastly efficiency also is a factor, which Pius X realized when he called for a unification of Italian seminaries. The financial, economical reason, therefore, would be a more tangible and solid one,

<sup>48</sup> *A. S. S.*, Vol. XVIII, p. 323; Vol. XXII, p. 80. Such reasons crop up when the canonical foundation commences to totter.

and might have been expected in the Code. Why to divide a parish of 300 families living within a radius of a mile, governed by a zealous pastor and his helpers, and weighed down by a debt of over \$100,000, or even \$44,000, is more than an ordinary mind can grasp. *Et tamen factum est ita.*

The Code, then, admits only two reasons for dividing or dismembering a parish, and hence some other reasons which have been advanced with more or less propriety in former days, cannot now be alleged,—*e. g.*, antipathy, dissensions, aversion of municipalities.<sup>49</sup> Neither can diversity of language or rite be alleged as a reason. As to *national* parishes, can. 216, § 4 excludes the erection of national parishes without a papal indult. The same rule applies to a parish of a different *rite* than the Latin, which certainly is a case reserved to the Apostolic See.

*Whether there are any reasons* at all, or whether they may be styled *canonical*, is a matter not easily defined, nor can a clear rule

<sup>49</sup> The *epitomator* of *A. S. S.*, Vol. XXII, page, 73, 79, says without proof that it had been the constant practice of the S. Congregation to admit the reasons quoted, but this is too broad an assertion, as may be seen from Fagnani and Bouix.

be given. Neither have the canonists nor the Roman Court set up a standard. Therefore it was generally held that the existence and sufficiency of the reasons alleged for dividing or dismembering a parish depends upon the prudent judgment of the bishop.<sup>50</sup> But it must also be added that the bishop should have his reasons prepared and proved, because it may be that recourse against his decree will be taken to Rome.

#### 4. *Formalities Required for Dismemberation*

The Code assigns the same formalities for a dismemberation as for a union of benefices. Therefore what was said above may in general suffice. However, some additions must be made on account of the importance of the matter, and hence a brief rehearsal may be useful.

1. First and above all, what Pyrrhus Corradus says still holds, *viz.*: that the truth and the existence of canonical reasons should not depend on the mere assertion of the interested

<sup>50</sup> De Luca, *Adnotationes ad Conc. Trid.*, Disceptatio XVI, n. 2; Fagnani, in cap. 3, *Ad audientiam*, III, 48, n. 18; Bouix, *l. c.*, page 262 f.

parties or of the bishop, but that *canonical reasons must be proved* to exist by at least a summary process, although not necessarily carried out according to all the rules prescribed otherwise.<sup>51</sup> A local inspection, made either by the bishop personally or through a disinterested delegate, and testified to by at least two witnesses, is sufficient. The rural dean, accompanied by another clergyman or a layman, may perform this investigation and report to the bishop. A sworn testimony is not required. But the report ought to be a truthful and unbiased statement of the facts.<sup>52</sup>

2. Then the bishop must "*hear his chapter,*" with us, the diocesan consultors. Can. 105, n. 1 requires this consultation or hearing for the validity of the act.

3. Under the same condition for the validity of the act must be heard "*those interested, and especially the rectors of the churches*" (can. 1428, § 1).

This was doctrine and law in former times,<sup>53</sup>

<sup>51</sup> *Praxis Beneficiaria*, l. III, c. 2, n. 7 (ed. Neapolitana, 1656, p. 300).

<sup>52</sup> See C. R. R. in *Sedunensi*, *A. Ap. S.*, IV, 452.

<sup>53</sup> Fagnani, in cap. 3, X, III, 48, n. 29. The statement, therefore, of the S. R. R. (*A. Ap. S.*, IV, 455), that the "*citatio*

and is formal law now, as per can. 105, n. 1. Those interested are the parishioners of the new and those of the old parish; but it is not necessary that *all* should be heard. In matter of fact the parishioners do not form a corporation; but their interests are safeguarded by the law. Their legitimate representatives are the trustees.

The *pastor* of the parish which is to be divided or dismembered must be summoned. If the parish is vacant, either a defender (for instance, the temporary incumbent) must be called or the summons must be delayed until a new pastor has been assigned to the parish. In case an incorporated parish is to be divided, the corporation itself, or, rather, its lawful superior, must be summoned, not the one who actually exercises the care of souls.<sup>54</sup> Hence if a parish which belongs to a religious community is to be divided, the lawful religious superior must be called.

If there is a *patronus*, or advowee, he must also be heard.

*et auditio quorum interest*" is not required for validity, sounds rather queer, and, after the Code, has no foundation.

<sup>54</sup> Bouix, *l. c.*, p. 268.



All these persons must, therefore, be heard, but the *bishop is not bound by their advice* or their objections. For not only does can. 105 exclude such obligation, but can. 1427, § 1 expressly states that the bishop may proceed to a division *against* the will of the pastor and *without* the consent of the people.

With regard to the *diocesan consultors*, they must be heard in a body, as is manifest from can. 105, n. 2, as compared with can. 427. What the chapter or the diocesan consultors are to deliberate on or give their advice about, is the fact of the division or, let us say, the existence of canonical reasons which prompt a division. The consequence is that, if the bishop should change the boundaries to be assigned to the new parish or extend the endowment, respectively the *portio congrua*,—in a word, if the bishop should not adhere to the view of the consultors in detail, the formality required must be taken as fulfilled, and no new advice need be asked.<sup>55</sup>

The Code demands that the advice be given

<sup>55</sup> S. R. R. April 2, 1911 (*A. Ap. S.*, IV, 458). This was the rule before the Code, when the *consent* of the chapter was required; hence much more now, when *advice* only is required.

with due respect, conscientiously and sincerely (can. 105, n. 3).

4. Can. 1428, § 1 requires an *authentic writ*. This is a serious obligation, because of the importance of the matter, but its neglect would not invalidate the division.<sup>56</sup>

5. The conditions so far mentioned are *formalities* in the strict sense of the word. However, there are two other requisites mentioned in can. 1427, § 3 and 4, namely:

(a) The Ordinary, when he divides a parish, must assign *sufficient revenues* to the new parish, with due regard to can. 1500. If no other source is available to provide the new parish with sufficient funds, these must be taken from the mother church, provided, however, that a sufficient income is left to the latter.

There are two clauses in this paragraph: the first one simply demands the assignment of sufficient revenues with due regard to can. 1500; the second assigns the eventual source.

As to the *sufficient revenues*, can. 1415 demands that the endowment should be permanent and sufficient, but admits prospective

<sup>56</sup> Blat, *l. c.*, p. 407.

income, as stated above. The endowment is the one mentioned in can. 1410. It should be sufficient for the maintenance of the fabric, the clergy, and worship. A definite sum can hardly be assigned, because the conditions vary from coast to coast.

The Code also rules that can. 1500 must be observed when a parish division takes place. Said canon states: If a territory (parish or diocese) is divided, so that part of it is united with another corporation, or a distinct juridical person,—in our case a parish,—is established out of the dismembered part, the common property must be divided and the debts which were contracted for the territory as a whole distributed by the competent ecclesiastical authority. This division must be made according to the principles of justice and equity, with due regard to the will of the founder or donors and to the acquired rights and the particular statutes governing the moral person who sustained the division. This text speaks of a division of the "*bona communia, quae in commodum totius territorii erant destinata*" and of "*aes alienum quod pro territorio contractum fuerat.*" What does this

mean? A parish, even though acknowledged as a corporation by the civil government, according to ecclesiastical law is a corporate institute, in which the individual parishioners have, indeed, an interest, but of which they are not members or stockholders. The subject of the corporation is not the collective will of the parishioners, but the lawful authority of the major ecclesiastical organization, *viz.*, the local Ordinary, who governs that corporation in accordance with its particular purposes and the general laws of the Church. Hence the property of a parish is vested in the holder of the title, whether he be the bishop or the pastor, who, however, is allowed to dispose thereof only in so far as the end or purpose of the corporation permits.

The consequence is that the property vested in the benefice or parish as a corporate institute or corporation in the sense of the civil law remains with the old parish, and the new parish has no strict claim to it.<sup>57</sup> What, then, can *bona communia* and *aes alienum commune* mean? *Bona communia* can only mean some property or money that the parish as such has

<sup>57</sup> Gyr, *l. c.*, pp. 179-198.

collected for the benefit of the whole territory or the whole parish. Such would be extraordinary collections taken up for the poor or orphans, or for the mutual protection of the entire parish and all its inhabitants, or collections made for a charitable purpose, for instance, the propagation of the faith, the Peter's Pence, etc., before this money has reached its destiny. The same principle applies to the debts. Corporate debts remain with the old corporation, debts contracted by the parishioners for other than corporate wants and obligations are to be distributed. For instance, if there is an asylum or a hospital or a school which is not incorporated with the parish, but supported by free contributions from the parishioners, both credits and debts must be distributed.

(b) The second clause of paragraph 3, can. 1427 provides for a sufficient support of the new parish from the *revenues of the mother church*, no matter what these revenues may be. To some extent this is old law; but the Code has widened its scope. The Tridentine law,<sup>58</sup> based upon *Caput "Ad audientiam"*

<sup>58</sup> Sess. XXI, cap. 4, *de Ref.*

(c. 3, X, III, 48) only mentions a *competens portio* for the priests of the new parish, while the parish as such, buildings and their maintenance, are not taken into consideration. The Code employs the term "*reditus*," the Tridentine text has "*fructus*," the Decretals use "*proventus*." But there can hardly be any doubt<sup>59</sup> that all these terms signify the same thing, viz.: revenues or income. For the Code, by adding "*quoquo modo pertinentes*," wishes to see included all kinds of income, and therefore intends to comprise all those revenues mentioned in can. 1410, also donations, bequests, etc., in so far as they are given to the parish as such, and not for a particular purpose or chapel or altar in the mother church.

The *amount* of the portion to be taken from the mother church is not determined. Former canonists said that so much may be taken as is required to maintain the pastor and his assistants.<sup>60</sup> However, the Code not only mentions the necessary support of the priests to be employed at the new church, but the new

<sup>59</sup> Some authors limited *reditus* to its strictest sense, as we would say capital and interest; Gyr, *l. c.*, p. 124.

<sup>60</sup> Bouix, *l. c.*, p. 276.



parish as such. This evidently requires a larger amount. A *negative* rule for fixing the amount is indicated in the Code when it rules that a sufficient income must be left to the mother church. This sufficiency again concerns not only the support of the priests, but also the fabric and expenses for worship and the support of the schools or charitable institutions incorporated with the old parish.

Are there in the U. S. any churches which can stand a division of their property or income? In order to answer this question it would be necessary to look up a specific census of the Catholic denomination in our country. However, even this might not be entirely trustworthy, since some reports are missing in the semi-official statistics of "*Religious Bodies 1916*" (11,653), where the value of church property is given as \$374,206,895 against a debt on this property of \$68,590,159. If we consider the interest to be paid on this debt, the expenditures for church and school, etc., the margin is very small. The fact is that these figures are below par, no matter how we may use the mathematical brain. Most of our parishes have just enough to "get along"

on with the help of the astounding generosity of our Catholic people.<sup>61</sup>

It may be added that the necessary support to be given to the new church can be required only from the mother church, as the text of can. 1427, § 3 plainly states, and hence the bishop has no right to tax another church for this purpose. This was also the old law.<sup>62</sup>

(5) Finally the Code, in can. 1427, § 4 determines: "If the chaplaincy or new parish is endowed from the revenues of the *old, the latter, as the mother church, is entitled to certain marks of honor* [from the new church], which should be determined by the Ordinary, who, however, is not allowed to reserve the right of the baptismal font to the mother church. The clause concerning the baptismal font is strongly stressed in can. 774, § 1. The Decretals granted the *iuspatronatus* to the mother church.<sup>63</sup> However, not only is our canon silent concerning such a right, but can. 1450 and 1451 deny it. Therefore the "marks

<sup>61</sup> There are exceptions which come from a certain class of foreigners who lived in countries with State support or who are possessed of very distorted ideas of supporting the church.

<sup>62</sup> Fagnani, *in cap. cit.*, "*Ad audientiam*," X, III, 48.

<sup>63</sup> See c. 3, X, III, 48.

of honor" should rather consist of some spiritual favors or slight material gifts. Sometimes a candle of certain weight or workmanship was given by the daughter church annually, or an invitation was tendered to the pastor of the old church to preach in the new church on the patronal feast or the anniversary of the dedication, and so forth. Notice, however, that the text only allows these signs when revenues have been detached from the mother church.<sup>64</sup>

#### 5. *Recourse from a Decree of Division*

Can. 1428, § 3 reestablishes what had already been permitted by the old law,<sup>65</sup> *viz.*: the *right of recourse*: "Against the decree of the Ordinary who unites, divides, transfers or dismembers benefices, recourse to the Holy See is granted, which recourse, however, has only a devolutive effect." Hence pastors

<sup>64</sup> In Switzerland some local customs prevailed, as, for instance, to give a certain amount of wine (we should now say "raisins," according to the latest translation of the Protestant Bible), or wheat, or a 100-pound cheese, to the pastor of the mother church, who preached on this occasion.

<sup>65</sup> C. 3, X, III, 48 says "*appellatione remota*," which, however, was understood as an appeal with suspensive effect.

whose parishes have been divided and who believe themselves unjustly treated may notify the local Ordinary that they intend to make use of the privilege granted by can. 1428, § 3, and bring the case before the Apostolic See. This notification must be forwarded to the bishop within ten days from the issuance of the decree.

However, the effect of such a recourse is not suspensive, but merely *devolutive*. Therefore, the division or dismembration takes effect, provided the local Ordinary has proceeded properly under the law. He may therefore immediately appoint the new pastor, who, after having received and accepted his appointment, can repair to the new parish, take up his residence there, and enjoy all the parochial rights.

What then, is the *effect* of such a recourse? The whole case devolves on the Apostolic See, or, more concretely, on the S. Congregation of the Council. Can. 1601 says: "Against the decree of the Ordinaries no appeal or recourse to the S. Rota is admitted; but all such recourses are exclusively treated by the Sacred Congregations." Hence the disciplinary, not

the judiciary way is to be chosen. This saves time and money, but whether justice is always administered in the same objective way by the S. Congregations as by the S. Rota, is another question, which depends to a great extent on the Prefect and the Secretary of the resp. Congregation.

The *recursus* should contain the decree of the bishop and plainly and briefly state the reasons why the division is regarded as unjust; if possible also a reference to former decisions should be given. The S. Congregation will forward the exposé to the local Ordinary, "*pro voto et informatione*," who will have to refute the reasons alleged against the division, and return the documents together with his own statement to the S. Congregation. The latter will then decide either: *recursum esse sustinendum* or *recursum esse reiiciendum*. If the recourse is sustained, the bishop has to recall the division and restore the former condition. If, on the other hand, the recourse is rejected, the division stands. Should the petitioner whose recourse was rejected by the S. Congregation insist on further procedure, there is only one way open, *viz.*: to direct

a petition to the Pope, who will leave it to the Segnatura Apostolica to decide whether the case should be brought before the S. Rota, as per can. 1603, § 2; can. 1905, § 2 (*de restitutione in integrum*).

# 6. Formulary for a Decree of Division<sup>66</sup>

Whereas the parish N., at N., in our diocese of N., has been examined by two delegates appointed by us, who have reported that a considerable number of the parishioners experience great difficulty to come to their parish church.

Whereas it has been proved to us by personal observation as well as by a thorough investigation made by two delegates appointed by us that the parish N., at N., cannot be properly attended to by the pastor, even with the help of assistants, the number of the parishioners exceeding . . . families, many of whom appear to be unknown to the pastor and to his assistants, and

Whereas we have asked, in said matter, the

<sup>66</sup> See Pyrrhus Corradus, *Praxis Beneficiaria*, l. III, cap. 2, n. 10, *ed. cit.*, p. 301 f.; Bouix, *De Parocho*, Appendix.



advice of our diocesan consultors and those interested,

Therefore, we, by the grace of God and the Apostolic See Bishop and Ordinary of the diocese N., have, by virtue of the power conferred on us by law and in accordance with this law, and in particular with canons 1427 and 1428, deemed it necessary to divide the parish N., constituting a new parish under the title N., with the following boundaries [East to West, North to South].

This new parish, under the title of . . . , will be, in accordance with can. 454, § 3, an irremovable parish. The same right we also confer on the old parish N., having first heard the advice of our diocesan consultors.

As to the revenues, the parishioners have promised, and subscriptions to the amount of \$      have proved their good faith and willingness, to do all in their power to establish a sufficient fund for the support of the pastor and the maintenance of the necessary buildings and divine worship.

Given at our episcopal residence in the City

of ..... this ..... day of .....  
19.....

Bishop of N. N.

### SECTION III

#### RELIGIOUS BENEFICES

Can. 1425 especially mentions religious benefices, *viz.*, such as belong by right to religious institutes (can. 1411, 2). All benefices established outside a church or house of religious are, by presumptive law, considered as belonging to the secular clergy (can. 1411, 2). From can. 1422 one would indeed have to conclude that a division or dismembration of a religious benefice is reserved to the Apostolic See. And since our religious parishes, or at least some of them, must be called, and are, benefices in the sense of the law, it would follow that religious parishes cannot be divided without a papal indult. Yet can. 1427, § 1 allows Ordinaries to divide parishes of any kind ("*paroecias quaslibet*"), including such as have been *pleno iure* in-

corporated with a religious community.<sup>67</sup> This practice was set forth in the Constitution of Leo XIII, "*Romanos Pontifices*," of May 8, 1881, and extended to the U. S. in 1885. Fagnani mentions an earlier decision which laid down the same rule,<sup>68</sup> but he expressly refers to the formerly held distinction between the ordinary power of the bishops and their quasi-ordinary or delegated power ("*etiam tanquam Sedis Apostolicae delegatus*"). The Code has simply made this power of dividing religious parishes an ordinary one.

If, however, a parish in charge of religious is a *national* parish, the local Ordinary is powerless, on account of can. 216, § 4, which forbids all innovations with regard to such a parish before having consulted the Apostolic See. Here the old maxim, "*generi per speciem derogatur*," which is the underlying principle of the interpretation given above of the two canons 1422 and 1427, § 1, cannot be applied, because both are particular or specific or determined cases. The last paragraph of can. 1427 rules: "A parish detached from one

<sup>67</sup> Thus also Blat, *l. c.*, p. 405.

<sup>68</sup> In *cap. "Ad audientiam,"* III, 48, n. 42 f.

which by law belongs to religious, does not become [by this act of division] a religious parish." The religious cannot claim it, but to obtain it the act of incorporation must come from Rome. This, too, was clearly set down in the "*Romanos Pontifices*."

If a parish has been, by papal rescript (as required by can. 452), united with a religious house as to temporalities only ("*ad temporalia tantum*"), the religious house is entitled to the revenues from that parish, and the superior must present to the local Ordinary a member of the *secular clergy*, who is appointed pastor and receives his salary from the religious house. Such a union can only be made by means of a papal indult, as can. 1423, § 2 expressly states.

Here a doubt naturally arises as to the propriety of the practice, prevailing in our country, of entrusting a parish to a religious community for the *time being*, a mode which, as far as the Code is concerned, has little support in either ancient or modern law. Perusing the acts and decrees of our synods and councils <sup>69</sup> we could not discover much mate-

<sup>69</sup> *Collectio Lacensis*, Vol. III.

rial referring to the present question. In 1810 the Archbishop of Baltimore and his suffragans enacted "certain articles," of which the second deals with the subject at issue. It mentions the consent of the religious superiors when the care of souls is entrusted to priests of secular or regular congregations, and says that priests thus employed should not be recalled without the consent of the bishop.<sup>70</sup> But whether or not there were general faculties granted either to bishops or religious to accept and administer parishes for as long as both parties thought it desirable, we could not ascertain. The Second Plenary Council (1866) demanded that religious should not relinquish a parish without informing the bishop six months ahead of time.<sup>71</sup> But it was silent about the power on which the general custom of entrusting religious with parishes was based. Among the questions which the S. C. de Propaganda Fide included in the

<sup>70</sup> "*Quando sacerdotibus pertinentibus ad saeculares aut regulares congregationes, e Superiorum consensu, cura animarum demandata est, iudicamus eos non debere ex Superiorum suorum arbitrio pendere ab eisque revocari, invito episcopo.*" (Coll. cit., p. 7.)

<sup>71</sup> *Acta et Decreta*, n. 407; also n. 406.

diocesan report was this one: Whether some parishes were committed to religious orders, and which orders?<sup>72</sup> The Third Plenary Council (1884) contains a paragraph pertaining to this subject. Among the cases for which the bishop has to ask the advice of the diocesan consultors is the one where a mission or parish is handed over to a religious community. Immediately the Council adds that in this case also the permission of the Holy See is required.<sup>73</sup> The wording of the text leaves open the question whether a permanent or only a temporary affiliation was meant. For the rest the Council anticipates the extension of the "*Romanos Pontifices*," originally issued for England, to this country. However, even now bishops, for one reason or another, sometimes entrust parishes to religious *ad tempus*. The Code, as stated, makes no explicit provision with regard to this matter; and necessity, in many cases at least, may justify the custom.

"If a parish," continues can. 1425, § 2, "is incorporated by the Holy See,"<sup>74</sup> *pleno iure*

<sup>72</sup> *Quest. 24, l. c., III, 570.*

<sup>73</sup> *Acta et Decreta*, n. 20.

<sup>74</sup> See can. 452, § 1; can. 456.



with a religious community the religious superior may designate one of his subjects to take charge of the same; but the local Ordinary has the right to subject the appointee to an examination and to give him his canonical appointment. Besides the religious pastor is subject to the jurisdiction, coercive power, and visitation of the local Ordinary in whatever belongs to the care of souls, as per can. 631."

The *S. C. Consistorialis*, July, 5, 1915, decided the question of competency respecting incorporation; it belongs to the *S. C. Concilii*, to which, therefore, the bishop must direct his petition. Orders and congregations of religious are, however, obliged to send their petitions to the Congregation of Religious, but formerly only in case their constitutions and rules forbade them to retain or govern parishes.<sup>75</sup> Now all religious orders and congregations must apply to that S. C. for incorporation (can. 452).

Can. 1425 speaks of a "*domus religiosa*," a religious house, while can. 456 mentions "*paroeciae religiosis concreditae*," and can.

<sup>75</sup> *A. Ap. S.*, VII, 327.

452, § 6 styles these religious "*persona moralis*." There can be little doubt but that the Code intends the same thing by all these terms. Yet it is juridically necessary to distinguish. For a *domus religiosa*, according to can. 488, § 5, may be either *formata* or *non-formata*. A *formata* or "full fledged" house is one in which there are at least six professed members; and, if the religious institute belongs to the clerical class, four of these six professed members must be priests. A *non-formata* house consequently is one in which there are less than six. A religious house, in general, is one which belongs to a religious institute, irrespective of the number of persons living therein.

Now the question arises whether a *domus non-formata* may have parishes incorporated with it? The answer can only be: If, according to the constitutions of the respective order or congregation, this house is acknowledged as a corporation (*persona moralis*), to constitute which three members are sufficient,<sup>76</sup> it may have parishes incorporated

<sup>76</sup> Can. 100, § 2.

with it. However, we hardly believe that any religious institute would grant juridical personality to such a house, unless it had, through adverse circumstances, been reduced to a lower condition than the one in which it was originally. This seems to be the mind of the S. C. of Religious, the latest decree of which mentions houses strictly called *filiales* or branch houses, which possess no property of their own and are governed by delegated superiors removable *ad nutum*.<sup>77</sup> Such houses are, for instance, dependent priories, hospices where there are only two or three religious, etc. As a rule parishes are incorporated only with such houses as have a major superior, or, in other words, with a provincial house, an abbey, or a canonically and juridically independent priory.

<sup>77</sup> S. C. Rel., Feb. 1, 1924 (*A. Ap. S.*, XVI, 95). We must, however, confess that said decree surprised us to some extent, especially if comparison is made with the authentic interpretation of can. 505 given by the Pontifical Commission on June 2-3, 1918 (*A. Ap. S.*, X, 344). It appears to us that there must be uncertainty in Roman circles as to the precise meaning of local houses and local superiors; or is the decree, perhaps, only a measure of expediency, because said canon can not be applied to all?

The next question turns about the *competent superior*. Can. 456 rules that, for parishes entrusted to religious, the superior, who enjoys this right by virtue of the constitutions, shall present a priest of his own institute to the local Ordinary for investiture. We believe that, generally speaking, only the "*superiores maiores*" mentioned in can. 488 are here intended. In case of the Benedictines, the abbot of the monastery, not the Abbot Primate or the Abbot President; in other orders and congregations with provincial organization, the provincials, their substitutes or representatives. If the respective constitutions provide otherwise (either extending or restricting the power of the superiors) they must be followed. The candidate presented must be a priest endowed with all the qualities required for a *parochus*. Therefore, our canon refers to can. 459, § 2, where the bishop is called upon to ascertain the ability of candidates presented by religious superiors,—not their learning only, but also the other necessary qualifications. Hence the bishop would be justified in requiring an examination as to

the fitness of the candidate presented, but he is not obliged to subject him to an examination if he feels morally certain as to his qualifications. If the candidate is found fit, the bishop is bound to give him the investiture. The bishop is not entitled to subject a religious thus presented to a *conkursus*, for this is neither prescribed by the Code nor favored by the old law.

We may add that the Decretals demand that the superior (prelate, abbot) should ask the consent of his chapter, unless ancient custom and prescription has derogated from, or abrogated, this right of the chapter. The Code does not abrogate this right, and hence, if the constitutions do not give the unqualified right of presentation to the superior, and custom has not abrogated the right of the chapter, the superior is obliged to ask the chapter for advice.

It may be noticed that this canon mentions only *one* priest, from which fact we may infer that the Code does require a companion. For here would have been the proper place at least to hint at the requirement of a *socius*.

*Rights and Duties of Religious who  
are Pastors*

It appears opportune to collect here from the dispersed texts all the material referring to religious parishes.

1. Concerning the *material administration*, the Code rules in can. 630 as follows: "A religious who governs a parish, either as pastor or as vicar, remains bound by the vows and constitutions in so far as compatible with his office."

Therefore, as to religious discipline, he is responsible, not to the Ordinary, but to his superior, who may inquire into his conduct and correct him, if necessary.

Property intended for the parish belongs to the parish; everything else he acquires is acquired for his religious brethren.

Notwithstanding the vow of poverty, he may collect and receive alms for the benefit of his parishioners, of Catholic schools and pious institutions connected with the parish, and administer and distribute such alms according to his own judgment and the intention



of the giver, under the supervision of his superior. But to receive, retain, collect, and administer alms intended for the building, maintenance, restoration, and ornamentation of the parish church appertains to the religious superiors if the church belongs to the religious community; otherwise to the Ordinary.

This last clause of § 4 seems impractical. It throws an unbearable burden on religious superiors who have many parochial churches. Furthermore, it may cause trouble with regard to trustees and parishioners, who are entitled to know how the money is spent. Lastly, can. 533, § 1, n. 4 requires a separate accounting for parish money and religious money. All this would seem to demand a host of officials in the convent. It is an entirely new regulation, which has yet to stand the test of experience.

Any religious, even though a member of a regular order, must have the consent of the Ordinary if he wishes to invest *church or mission money*, i. e., money received from pew-rent, church collections, collections taken up at lectures in favor of the church, house collections, and subscriptions. To this category

also belongs money given to a religious pastor for his mission or church, but not personal donations, or donations given to a religious because he is a religious or a member of a certain community. Hence any investment of church money needs the consent of the Ordinary of the diocese in which the church or mission is located, not of the Ordinary in whose diocese the investment is to be made.

2. With regard to the *relation of religious pastors to the local Ordinary* the Code says in can. 631: Religious pastors or assistants, even though they may exercise the sacred ministry in the house or place where the higher superiors of the institute have their habitual residence, are immediately subject, in all matters concerning their pastoral charge, to the jurisdiction, visitation, and correction of the Ordinary of the diocese, just like secular pastors, with the sole exception of the regular discipline. Therefore, if a religious pastor or vicar neglects his pastoral duties, the Ordinary of the diocese may issue opportune orders and inflict penalties. However, he may not proceed alone, but only in union with the religious superior; if the decisions of the latter

conflict with those of the Ordinary, the latter's decree prevails.

3. Concerning *vacancy*. Properly speaking there can be no vacancy in a religious parish, because the habitual pastor, namely, the juridical person or corporation, is not supposed to die or go out of office or function. Consequently, the religious pastor neither takes possession of the parish in the canonical sense, nor does he leave the parish vacant when he is removed. When a so-called vacancy occurs, the competent superior assumes the government of the parish, and immediately informs the local Ordinary of the vacancy. The latter, with the consent of the religious superior, appoints an *oeconomus* or administrator. If a disabled religious pastor needs an assistant, the religious superior presents for this office one of his own religious institute to the local Ordinary. The same procedure is observed if an assistant is required because of an increase in the number of parishioners. But the legitimate superior is obliged to ask the advice of the religious pastor for the valid appointment of an assistant (can. 476, § 4).

4. Concerning the duty of *residence* and

other parochial duties and rights, the religious pastors are on a par with the secular clergy, except that for a vacation they need the permission of both the local Ordinary and their own superior.<sup>78</sup>

5. If a parish church is attached to a religious community, whose members make use of this church for their own spiritual purposes, the relation is regulated by can. 415.

The *pastor* has the following obligations: (a) to apply the Mass for the people, and to preach and teach catechism at the times prescribed; (b) to keep the parochial books and take from them the attestations required; (c) to perform the funeral service; (d) to perform such other functions as are usually held in parish churches, provided, however, that the choir services do not interfere, or that the chapter does not perform the same; (e) to collect alms for the good of the parishioners, to accept such as are either directly or indirectly offered, and to administer, and distribute them according to the intention of the donors.

The *chapter* on its part is bound: (a) to

<sup>78</sup> Can. 465, § 4.

take care of the Blessed Sacrament, leaving one key with the parish priest; (b) to see to it that the liturgical rules are observed by the parish priest in the performance of all functions in the chapter church; (c) to take proper care of the church and administer its possessions and legacies.

The parish priest shall not interfere with the functions of the chapter, nor the chapter with the parochial functions. If a conflict arises, the Ordinary should settle it. He shall also see to it that catechetical instructions and gospel explanations are given at an hour most convenient for the faithful. The Code, then, exhorts the chapter members to lend a helping hand in case the regularly appointed assistants should be wanting. However, the Code also rules that it is the personal duty of the parish priest to preach on Sundays and holydays of obligation, and that he cannot habitually throw that burden on others, unless for a just cause, which must be acknowledged as such by the Ordinary (can. 1344). An antiquated custom imported from a foreign country could not be styled a just reason. A pastor is selected *de industria personae*, for his personal

qualifications, among which is that of preaching.

6. With regard to removal of religious pastors can. 454, § 5 and can. 631, § 3 rule thus: If the bishop wishes to remove a religious from the post of rector, he may do so at will, and is not bound to give his reasons to the religious superior or to prove his right to make the change. The same applies to the religious superior. Should a clash ensue, the last and only remedy is an appeal to Rome (the bishop to the S. C. Conc. and the religious superior to the S. C. Rel.). Such an appeal leaves the removal in force until the Holy See has decided. For this is the meaning of an appeal "*in devolutivo*" as opposed to an appeal "*in suspensivo*," that it does not suspend or nullify an act or sentence until the higher instance has decided the case.

## SECTION IV

### TRANSFER, TRANSFORMATION, AND SUPPRESSION OF PARISHES

1. A *transfer* of a parish takes place when the seat of the parish is changed from one



place to another within the boundaries of the same.<sup>79</sup> By "seat of the parish" is to be understood the *church* where the divine offices are held and the parochial rights exercised. Hence it would not follow *per se* that the parsonage, too, should be transferred. For although the law of residence demands that the pastor reside near the parochial church, yet the local Ordinary is entitled to permit him to reside somewhere else, provided the parochial functions can be properly discharged.<sup>80</sup> It matters not whether the transfer is made to a church yet to be erected or to one already existing, though in the latter case there are certain special obligations to be complied with.

The *competent authority* for making the transfer is the local Ordinary, as explained and stated under can. 1423. But from this power are excluded religious parishes, which the bishop cannot transfer without a papal indult, since can. 1426 expressly mentions only secular benefices or parishes. Consequently

<sup>79</sup> Can. 1421; can. 1426.

<sup>80</sup> Can. 465, § 1; Fagnani, *in cap. 30 de Praebendis*, III, 5, 59 f.

parishes *pleno iure* incorporated with a religious community cannot be transferred without the intervention of the *S. C. Concilii* and of the S. C. of Religious, because in this latter case a transfer of a religious community might be involved.

The reasons for a transfer are the same as for a union of benefices, *viz.*: either necessity or great and evident utility. A case of necessity would be bad sanitary conditions or hopeless state of the old church building.<sup>81</sup> Also if the space for a necessary enlargement of the church cannot be procured on the old site. Evident and great utility could be alleged in favor of a more central or more accessible location. Besides, in cities with a fluctuating population the condition of business and of religion must be considered.

Can. 1428, § 1, requires the same *formalities* for transfers as for unions and divisions. It must be added that if the new parish seat belonged to a confraternity or religious community, their consent would be required and

<sup>81</sup> *Trid.*, Sess. XXI, cap. 7, *de Ref.*; Synod of Westminster, 1855 (*Col. Lac.*, III, 981); *A. S. S.*, I, 217 f.; IX, 476 ff. (*S. C. C.*, Feb. 27, 1864; June 2, 1876).

the case would have to be settled by Rome.<sup>82</sup>

As to *endowment* it is supposed to be transferred from the old to the new church, as are all rights, temporal as well as spiritual.<sup>83</sup> However, the bishop should see to it that can. 1415 is observed with regard to the (at least prospective) security of the necessary support. Besides, if the new parish church was already built, and was a church of advowson, the patron must be asked, and a compact should be made so as to guarantee his rights as well as those of the bishop and the pastor.<sup>84</sup>

2. A *transformation* is a specific change of benefices, for instance, if a *non curata* were turned into a *curata* (can. 1421). Can. 1430 treats of such transformations by briefly repeating the old law.<sup>85</sup> The Code forbids local Ordinaries to transform benefices that have the care of souls attached to them into such as have no such charge, or to transform religious benefices into secular ones, or *vice*

<sup>82</sup> S. C. C., June 2, 1876 (*A. S. S.*, IX, 481); this church had formerly belonged to the Tertiaries of St. Francis, whose rights were guaranteed by the S. Congregation *in casu*.

<sup>83</sup> Wernz, *Ius Decret.*, II, p. 362, n. 259.

<sup>84</sup> S. C. C., Feb. 27, 1864 (*A. S. S.*, I, 219).

<sup>85</sup> *Trid.*, Sess. XXV, cap. 16, *de Ref.*

*versa*. On the other hand, the local Ordinaries may change simple benefices into curate ones, provided there be no express stipulation to the contrary on the part of the founder. For the will of the founder must be respected, and the bishop must watch over its faithful execution.<sup>86</sup> A change of such a last will and testament can only be made by the Apostolic See.<sup>87</sup>

Some kind of a transformation is the change of an irremovable parish into a removable one, which can only be made by the Apostolic See; while a removable may be changed into an irremovable one by the bishop, with the advice of the diocesan consultors.<sup>88</sup> This is not properly speaking a transformation, because it does not induce a specific change.

3. *Suppression* takes place when a parish ceases to exist. However, extinction is rather a concomitant phenomenon of union, which is hardly imaginable without some kind of suppression, and, therefore, suppression is simply mentioned as an extinctive union, of which

<sup>86</sup> Can. 1493; can. 1515.

<sup>87</sup> Can. 1517.

<sup>88</sup> Can. 454, § 3.

enough has been said. The extinctive union of parishes, says the Code (can. 1422), is reserved to the Holy See.

### *Civil Church Law*

Our sources are not encumbered with too many decisions on the matter under discussion. This is very natural. For since Catholic parishes are not, as a rule, territorial units, they are not affected by civil law, except in what concerns consolidation or transfer, and dissolution or suppression.

1. "At common law," says Zollmann, "corporations had no power to consolidate. They could, however, surrender their charter and acquire a new one. Under modern incorporation acts such power to consolidate is sometimes granted, subject to certain conditions. Two religious corporations cannot therefore consolidate without such authority or without at least an attempt to comply with the law on this subject. Nor can such consolidation be effected unless the corporations are of a similar nature, with purposes and machinery which are not essentially different. When

carried out (*viz.*, the consolidation of two religious societies) so as to create a new corporation, the old corporations will be absolutely wiped out, so that a devise or bequest to either will not inure to the new corporation, but will fall to the ground.”<sup>89</sup>

Concerning the *transfer* of churches, it has been decided in one case that “the house of worship may be removed from one lot to another, or from one village to another, without an application to the court. Pew-holders have no standing to object to such removal.”<sup>90</sup> Neither is the title to property once conveyed to a corporation forfeited by the removal of the buildings erected by the corporation on the lot. Such a removal does not constitute a forfeiture.<sup>91</sup>

The courts had quite a few opportunities for deciding cases of *secession* or *schism*, and they decided them uniformly in keeping with

<sup>89</sup> *L. c.*, p. 104 f.; as to N. Y. State law, see *ibid.*, p. 100; *Selkir v. Klein*, 100, N. Y. Supp., 449; 50 Misc. 194; *Gladding v. St. Mathews' Church*, 25, R. I., 628; 57 Atl., 860; 65, L. R., 225.

<sup>90</sup> *Matter of the Second Baptist Society, Canaan, N. Y.*, 20, How. Pr. (N. Y.), 324 (Lincoln, *l. c.*, p. 535).

<sup>91</sup> *Carter v. Branson et al.*, 79, Ind. 14 (Lincoln, *l. c.*, p. 267).



the laws of the Catholic Church. There is no doubt about the right (physical, not moral) of a church organization to secede at will. The same is true of any number of members of such organizations; but no number, however great the majority may be, has the right to secede and take the church property with it to the new affiliation, so long as there remains a faction which abides by the doctrines, principles, and rules of the church government which the united body professed when the land was acquired.<sup>92</sup> There is now no Catholic parish which is not under the government of a Catholic bishop. Should any members attempt to establish a community of rebels, the Church would not acknowledge it as a parish. Yet such things have happened. The property was assigned to the independent corporation, because they had not made any declaration in their bylaws that they intended to be affiliated with a Roman Catholic bishop.<sup>93</sup>

<sup>92</sup> *Karoly v. Hungarian Reformed Church*, 83 N. J. Eq. 514; and thus in all other cases quoted by Lincoln, *l. c.*, p. 697 f.

<sup>93</sup> *Dochkus v. Lithuanian Benefit Society of St. Anthony*, 206 Pa. St. 25; *Canadian Religious Association v. Parmetier*, 180 Mass. 415 (Lincoln, *l. c.*, p. 671).

Not entirely in keeping with the laws of the Church is the following decision: "In case of a division of a religious society or corporation, where both parties still adhere to the tenets, doctrines, and discipline of the organization, the property should be divided between them in proportion to their members at the time of the separation."<sup>94</sup>

This, we said, is not entirely in conformity with the tenets of the Catholic Church, because parishioners are not juridically speaking members of the corporation. Besides, divisions must be made as laid down under can. 1500, explained above.

The following decision, on the other hand, cannot be reproved: A division was made, with the approval of the bishop of the diocese, of one parish into two distinct parishes. The original property was sold to the original congregation, and a bond was given to the new congregation for its interest in the property. In an action on the bond it was held that there was a valid consideration for the contract resulting from the division and separation and

<sup>94</sup> *Hale v. Everett*, 53 N. H. 1 (Lincoln, *l. c.*, p. 697); the decision did not concern a Catholic church.

the agreed apportionment of the original property.<sup>95</sup> Canon 1529 would uphold this view.

<sup>95</sup> *Arts v. Guthrie*, 75, Ia. 674 (Lincoln, *l. c.*, page 706).

## CHAPTER IV

### ADMINISTRATION OF PARISHES

Each and every parish, according to can. 216, § 1, consists of three elements, *viz.*: the pastor, the parishioners, and the church in which the people worship and the pastor exercises his functions. Thereby the divisions of the subject are clearly outlined.

#### SECTION I

##### THE PASTOR

The pastor is here considered only inasfar as he is connected with the parish. His connection begins with his appointment and ends with his removal. During his term of office he has the spiritual and temporal administration of the parish.

##### 1. *Appointment*

“A parish priest,” says can. 451, § 1, “is a priest or moral person to whom a parish is

entrusted *in titulum*, with the care of souls to be exercised under the authority of the Ordinary of the diocese." It follows that the bishop of the diocese, *i. e.*, the local Ordinary, has the right to appoint pastors. To this general rule there is only one unconditional exception, which is that of a reserved or consistorial benefice which the Apostolic See has reserved to itself for bestowal. For, according to can. 1431, the Roman Pontiff enjoys the right to confer all and any benefice. But the time of multiplied reservations has fortunately passed, and the bishops, especially in our country, have the unimpeded right to appoint pastors.

The *Vicar-General* needs a special mandate to make such an appointment, except when the episcopal see is *impedita*, in which case the whole government of the diocese devolves on the Vicar-General.<sup>1</sup>

The *Vicar Capitular* (our administrator), during the vacancy of the episcopal see, may appoint *vicars* as per can. 472-476; he may accept and canonically institute candidates presented by those who are entitled to pre-

<sup>1</sup> Can. 455, § 3; can. 429, § 2.

sent; thus he may institute a religious pastor presented by the competent superior; and, finally, he may appoint a pastor to a vacant parish if the episcopal see has been vacant at least 365 days.<sup>2</sup>

The same rights are also inherent in the *Administrator Apostolicus*, if he has been appointed for a limited time only; if appointed permanently, he enjoys the same rights as a residential bishop.<sup>3</sup>

The act of appointment may be somewhat limited, therefore a preferment which the bishop is entirely free to make (*liberae collationis*) is distinguished from a preferment made upon election or presentation. *Election* is safeguarded by the Code,<sup>4</sup> but it is not in vogue in this country. The Code also guarantees *presentation*, which is inherent in patrons and in religious communities that have incorporated parishes. Therefore to a parish which is of free collation the bishop: (a) names or chooses the pastor, (b) appoints him canonically, and (c) installs him canonically.

<sup>2</sup> Can. 455, § 2.

<sup>3</sup> Can. 315.

<sup>4</sup> Can. 455, § 1.



The right of presentation takes away the choice, and the installation, *i. e.*, the bodily introduction into the parish, is omitted in the case of religious because a religious parish properly speaking never becomes vacant.

With the exception, therefore, of parishes reserved to the Holy See,—of which we doubt if there are any in our country,—and with the limitation of presentation exercised by the competent superior of religious communities which have incorporated parishes, our local Ordinaries have the unimpeded right to confer all parishes upon such priests as they deem fit. This right is clearly laid down in can. 455, § 1 and can. 152. Hence, according to the Code, the parishioners have neither the right of election nor that of presentation in the U. S.

In order that the bishop may licitly and validly appoint a pastor, the parish must be either newly constituted or *vacant*. For an appointment to a parish which *de iure* is not vacant, would be null and void, nor would it become valid by a subsequent vacancy. Vacancy is effected by resignation, privation, re-

moval, transfer, or lapse of time.<sup>5</sup> A parish which *de iure* is vacant, but *de facto* unjustly held by another priest, can be validly conferred, provided a declaratory sentence has been issued to the effect that the respective possession is unlawful, and provided mention is made of that declaration in the letter of appointment.<sup>6</sup>

With regard to the *time* within which a parish should be provided with a pastor, as a rule, provision should not be delayed more than six months. These six months are to be reckoned from the time when the vacancy has become known to the local Ordinary.<sup>7</sup> However, can. 458, which mentions parish provision in particular, allows the local Ordinary to defer the definitive appointment of a pastor for special reasons of circumstances, places, or persons. How long this delay may be protracted is not stated. Circumstances of place may be material or moral, *e. g.*, unpaid debts,

<sup>5</sup> Can. 150; can. 183, § 1.

<sup>6</sup> Can. 151.

<sup>7</sup> Can. 155. This notice should be furnished by the rural dean, can. 447, § 3; but the law speaks in general terms, thereby insinuating that any trustworthy information is sufficient.

unsafe conditions by reason of a shifting population, the erection of a parish school, the advisability of punishing the people for their treatment of the former pastors, etc. Circumstances of person refer to the person to be appointed, for instance, if there be a lack of priests qualified for that parish. These reasons should not be personal whims of the bishop, but they must be objective and real. This may be judged from two decrees of the *S. C. Concilii*. The first, issued Nov. 14, 1916, allowed bishops to delay provision, but the second, of Feb. 26, 1919, revoked the permission, because the war had ceased, and therefore the Holy Father required that the former decree should lose its force.<sup>8</sup>

Concerning the *formalities* required, the Code (can. 159) prescribes that all appointments to office, hence also the appointment of a pastor to a parish, should be made *in writing*. Since the text, however, has no invalidating clause, it would be beyond the mind of the legislator to maintain that writing is required for the validity of the act.<sup>9</sup> But

<sup>8</sup> *A. Ap. S.*, VIII, 445 f.; XI, 77.

<sup>9</sup> Thus also Blat, *Comment. in C. I. C.*, lib. II, *De personis*,

writing should not be omitted lightly; rather the document should bear an official character, and therefore be signed by the bishop,—not the chancellor, except by the bishop's special commission,—and sealed with the diocesan or episcopal seal. We may add that the appointment should be recorded and an abstract or notice kept in the diocesan archives.<sup>10</sup>

With regard to *fees* to be paid for expediting papers of appointment, the Code has no particular enactment. Therefore this matter should be dealt with according to can. 1507, which regulates all fees and taxes, except those for matrimonial dispensations and funerals. The former practice and teaching of the school was that the conferring of benefices must be *free of charge*, lest it savor of simony, which would nullify the act.<sup>11</sup> For this reason can. 1441 forbids and reprobates as simoniacal all deductions made from the revenues, all compensations and payments in the

ed. 2, 1921, p. 125. Frivolous is the practice of omitting the writing in order to be able to make arbitrary changes or to save one's face.

<sup>10</sup> Can. 375, § 1, calls for an indexed catalogue.

<sup>11</sup> See our *Commentary*, Vol. II, 108.

act of preferment, no matter whether they accrue to the appointer (bishop) or to the *patronus* or to others.<sup>12</sup> Thus the bishop has no power to demand, even conditionally, an annual or other subsidy for his cathedral or seminary or any charitable institution, when he makes an appointment. All such transactions are null and void, and, if made, do not bind in conscience.<sup>13</sup>

Neither can the bishop curtail the salary in favor of another priest, who is perhaps sick or needy, at the time of the appointment.

On the other hand, *pensions* may be attached to parish benefices. Thus can. 1429, § 2 rules: "Local Ordinaries can impose pensions on parochial benefices, but only in favor of a pastor or substitute of the same parish when the latter goes out of office; but the amount of this pension shall never exceed the third part of the entire parish revenues, after expenditures and uncertain revenues have been deducted." A pension is a periodical allowance or income from a strange benefice

<sup>12</sup> See c. un. X, III, 12; cc. 8, 9, 41, 44, V, 31; *Trid.*, Sess. XXIV, cap. 14, *de Ref.*

<sup>13</sup> Can. 727.

granted lawfully and for a just cause. In our case the source or capital from which the allowance is drawn are the *parish revenues*, not the pastor's salary or income; it is a real, not a personal, burden laid on the parish. The one who is benefited by the pension is either a former pastor or former assistant of the parish from the revenues of which the pension is to be taken. Consequently, a pension cannot be demanded from a parish with which the pensioner has never been connected in the official capacity of either pastor or assistant.

*Vicarius* should be taken in the sense of chapter X, tit. VIII, Book II, which is inscribed, "*De Vicariis Paroecialibus.*" It includes the administrator, the coadjutor of a disabled pastor, the assistant proper or curate, and the actual pastor of an incorporated parish.

A pastor or *vicarius* is entitled to a pension only in case he goes out of office (*a munere abeuntis*). The authority quoted by Card. Gasparri is a decretal of Clement III. It mentions a pastor stricken with leprosy and consequently unfit to serve the parish, and orders him to be removed from office; it also



demands that the parish should administer to the wants of its former pastor as far as possible during his lifetime. From this it may be judged that the pastor or vicar is supposed to be *disabled* entirely. The consequence is that if he leaves his office and is able to take another charge which furnishes him a sufficient livelihood, he is not entitled to a pension. This seems implied also in the term "*in commodum*," which we translate "in favor," although the Latin term is perhaps more restrictive, meaning utility or advantage. However, we confess that this text, like a few others of the Code, is quite elastic.

But the parish is burdened only conditionally. For the text allows the pensioner only one-third of the gross revenues, *after* all the expenses and uncertain revenues have been deducted. The ablative absolute, "*quibusvis deductis expensis et incertis redditibus*," merely has the meaning of *provided*, viz.: provided there is something left after all the expenses, etc., have been deducted. The parish, therefore, is not to be burdened with a new tax on account of a pension. In plain words: if the parish can stand the extra ex-

pense of a pension, the bishop may decree it; otherwise not. How is the bishop to gauge the capacity of the parish? From the annual statement of its finances. Take a case where the gross income of a parish is \$4000. From this sum the pastor's salary,—we suppose he has no assistant,—the expenses for the maintenance and insurance of the buildings, for fuel, light, and water, for the school, etc., are to be deducted. How much remains? Let us say a thousand dollars. The pension would then amount to about \$333. But if there are debts on church or school, the interest at least would have to be deducted. The stole fees must not be included in the "uncertain revenues," nor do they enter the heading of parish revenues, for they are strictly speaking part of the pastor's income.<sup>14</sup> In our country the parish revenues may be said to consist of the pew-rent,—whether raised by way of card or budget system is immaterial,—the subscriptions which are regularly paid, and the Sunday collections. The diocesan and extraordinary collections for certain purposes cannot form a basis for calculating a

<sup>14</sup> Blat, *De Rebus*, p. 409.

parish's revenues, for they go out as soon as they come in. This, we believe, is a pretty fair statement of the conditions in which most of our rural parishes are placed. City parishes offer a somewhat different aspect, but their expenses, as a rule at least, are higher. We should not forget that the Code says "*beneficia paroecialia*," which supposes canonically established parishes. These were formerly endowed and enjoyed stable revenues. If we apply the strict interpretation, no pension can be imposed on a parish which is not canonically established, *i. e.*, which lacks one of the three essential conditions: a resident priest, endowment, and fixed boundaries.

*How long* does a pension run? Can. 1429, § 3 says that pensions imposed either by the Roman Pontiff or by other collators cease *with the death of the pensioner*, unless expressly defined otherwise. A pension once granted may, however, be withdrawn by way of a vindictive penalty, provided, of course, the canonical procedure is duly followed and the pension was not the title of ordination.<sup>15</sup> Be-

<sup>15</sup> Can. 2298, n. 6; can. 2299, § 3.

sides, after a condemnatory or declaratory sentence of excommunication the pensioner is *ipso facto* deprived of the fruit of his pension; an *excommunicatus vitandus* loses the pension itself.<sup>16</sup> A cleric who has incurred the excommunication mentioned in can. 2334, or who has joined the Masonic sect, must be deprived of his pension;<sup>17</sup> also one who has laid violent hands on a cardinal or legate of the Roman Pontiff,<sup>18</sup> or who has usurped or retains property belonging to the Roman Church.<sup>19</sup> Forgers of Apostolic documents may also be thus deprived.<sup>20</sup> If a pastor or assistant pastor is excommunicated, he is disqualified for a pension.<sup>21</sup> Those promoted to the cardinalate lose their pension.<sup>22</sup>

What if a priest leaves the diocese against the will and express command of his Ordinary? This case is not adequately stated in the Code. *Per se*, therefore, the pension does

<sup>16</sup> Can. 2266.

<sup>17</sup> Can. 2236.

<sup>18</sup> Can. 2343, § 2, n. 3.

<sup>19</sup> Can. 2345.

<sup>20</sup> Can. 2360, § 2.

<sup>21</sup> Can. 2265, § 1, n. 2.: "*quilibet excommunicatus*," without distinction.

<sup>22</sup> Can. 235.

not cease on account of this act of disobedience. However, the local Ordinary may have grave reasons for looking upon this disobedience as falling under can. 2331, § 1, and may, therefore, proceed to the infliction of censures, for instance, suspension, whereby the pension is liable to privation.<sup>23</sup> Besides, he may also, for grave reasons, inflict this privation or suspend the pension as a vindictive penalty.<sup>24</sup> But in both cases canonical warning and procedure are required. An *ipso facto* privation of the pension, in this case, is not to be found in the law.

As to the clause *prohibiting alienation of pensions*, it should be remembered that a pension is supposed to afford a decent livelihood, thus preserving the cleric from indecent beggary or engaging in sordid occupations. There is yet another reason stated in a decree of the former Congregation of Bishops and Regulars, *viz.*: the danger of law suits, which may scandalize the faithful and bring disgrace upon the Church. Therefore, every cession, or transfer, or alienation of any kind

<sup>23</sup> Can. 2283 as compared with can. 2265 and can. 2266.

<sup>24</sup> Can. 2298, n. 6.

was forbidden, unless a special and express grant to that effect was given.<sup>25</sup>

With respect to the *qualifications*, it may suffice to say that any appointment to a parish of one who is not a priest at the moment of the appointment is invalid.<sup>26</sup> This is the law of the Code, and a new one. The Code also calls for an *examination* of candidates to parishes, and enacts that the *concursum*, where it is prescribed, should be followed according to the Constitution of Benedict XIV, "*Cum illud*." What the Third Plenary Council of Baltimore enacted with regard to the qualities of aspirants is neither against nor beyond the Code, and therefore remains law in our country.<sup>27</sup>

## 2. Removal

The Code mentions two kinds of parishes, irremovable and removable. Although there is no specific difference between the two

<sup>25</sup> S. C. Epp. et Regg., March 12, 1840 (Bizzarri, *Collectanea*, 1885, page 91 f.).

<sup>26</sup> Can. 154; can. 453, § 1.

<sup>27</sup> *Acta et Decreta*, nn. 36, 47; cfr. our *Commentary*, Vol. II, 531 f.



classes of pastors, yet there is quite a remarkable distinction between them when removal or transfer or the law of residence are considered. Having set forth this subject elsewhere,<sup>28</sup> we may limit our comments to the following:

1. The *local Ordinary* can remove from office an irremovable as well as a removable pastor.<sup>29</sup> Concerning *penal* removal, it is expressly stated in the Code that the *Vicar-General* cannot, without special mandate, inflict penalties.<sup>30</sup> With regard to *administrative removal*, the Code is not so explicit; only can. 2148, § 1 says "*ipse met Ordinarius*," the Ordinary himself, should act in the removal of pastors. At any rate it would be safer to apply the special mandate, if the *Vicar-General* is called upon to proceed in a case of removal.

2. A pastor may lose his office by resignation, privation, removal (in the administra-

<sup>28</sup> See our *Commentary*, Vol. VII, 403 ff.; *The Pastor*, p. 254 ff.; *Rights and Duties of Ordinaries*, p. 451 ff.

<sup>29</sup> Can. 192; can. 2148.

<sup>30</sup> Can. 2220, § 2.

tive way), transfer, and lapse of time, if this has been fixed.<sup>31</sup>

3. All these modes of cessation of office are regulated by law, which must be strictly followed.<sup>32</sup> Thus a pastor cannot *resign* his office without presenting his resignation to his Ordinary, who must accept it. If two pastors wish to exchange parishes, this can only be done with the consent of the local Ordinary. And in this case the bishop himself is competent, not the Vicar-General, except with a special mandate, nor the Vicar Capitular.<sup>33</sup> When the two parishes are unequal, for instance, as to income or other value, no compensation by way of reserving part of the revenues or the payment or grant of any valuable object is permitted.<sup>34</sup> Two pastors agreed among themselves that A should receive B's parish, giving B the sum of \$500 for a trip. The resignation of B was promptly accepted by the Ordinary, who granted the parish to A. Was the provision valid? It was, because the

<sup>31</sup> Can. 183.

<sup>32</sup> Can. 184 ff.

<sup>33</sup> Can. 1487.

<sup>34</sup> Can. 1488.

act of provision or appointment was free from simony, since the collator was in nowise involved, and the provision itself was not infected by simony.<sup>35</sup> It may have been *simoniacal subjectively*, if the giver and receiver were under the impression that they committed simony; but *objectively* they did not commit simony, since the \$500 were only one motive for resigning, not the final or exhaustive reason. Besides, the exchange and resignation were performed according to law, and the Ordinary had no part in that somewhat peculiar deal. Can. 1488 does not mention either simony or invalidity. We mention this here because we have been asked for our view.

4. *Privation of an irremovable pastorate* can be inflicted only by the strict observance of the prescribed procedure, and only for a crime which in law is expressly described as deserving this penalty.<sup>36</sup> Thus a pastor is deprived of both parishes if he tries to retain the old parish after he has taken peaceable possession of the new, which, of course, would

<sup>35</sup> Can. 729, § 1; can. 1441.

<sup>36</sup> Can. 192; can. 2299; see Sole, *De Delictis et Poenis*, 1920, p. 201.

not be the case if both parishes were *aeque principaliter* united.<sup>37</sup> Thus a pastor who has become an *excommunicatus vitandus* loses his parish *ipso facto*.<sup>38</sup> Others should be deprived of their pastoral benefices; others may be deprived.<sup>39</sup>

A removable pastor, and consequently an assistant pastor or curate, may be deprived of his office: (a) even though he has not committed a crime expressed in law as deserving privation, (b) for a just reason, according to the prudent judgment of the Ordinary, who, however, (c) must follow the dictates of equity, although (d) he is not bound to employ the strict legal procedure, but only to observe the rules laid down in can. 2157-2161, and (e) provided the benefice is not the one to which the priest was ordained.<sup>40</sup>

5. The *administrative* removal of an irremovable pastor must be effected according to

<sup>37</sup> Can. 2396.

<sup>38</sup> Can. 2266.

<sup>39</sup> Those who *must* be deprived (preceptive penalty) are mentioned in the following canons: 2314, 2331, 2343, 2345, 2346, 2350, 2354, 2359, 2368, 2381, 2384. Those who *may* be deprived (optional penalty) are mentioned in canons 2324, 2336, 2355, 2359, 2360, 2394, 2401, 2105.

<sup>40</sup> Can. 192, § 3; can. 2299, § 3.

can. 2142-2156; that of a removable pastor in accordance with can. 2157-2161.

6. The *transfer* of an irremovable pastor requires a papal indult. But a removable pastor can be transferred against his will, provided the Ordinary observes the rules laid down in can. 2162-2167.

From this it may be seen that there is a voluntary and an involuntary removal. The latter may be purely administrative or penal. But not even a voluntary removal or change can be effected without the consent of the local Ordinary to whom the priest owes canonical obedience. This also involves that pastors must not leave their post as long as their Ordinary does not deem a change or removal necessary.<sup>41</sup>

After removal the pastor must, as soon as possible, *leave the parochial residence* and all the belongings of the parish to the new pastor or the administrator appointed *pro tempore* by the Ordinary. This is the ruling of can. 2156. It means especially that all the parish books must be handed over, and all the account books which contain the financial

<sup>41</sup> Can. 127 f.

status of the parish; also all plans or designs which refer to the parish buildings—unless the departing pastor has made these plans himself, because in that case they would be his mental and material property. The canon also implies that all the furniture of the residence and the *sacra suppellex* must be left in the parish, if it was furnished by the parish or *intuitu parochiae*. Personal belongings, such as books or other articles bought by the priest out of his own pocket, and pieces of furniture which are a family heirloom, or were given to him as an individual, he may take along.

If the pastor who is ordered to leave the parochial residence, is so *sick that he cannot conveniently* be transported to another place, the Ordinary should leave him in the enjoyment, if necessary, even exclusive enjoyment, of the parochial residence, says the same canon.

### 3. *Functions of Pastors*

The functions of a pastor, which we shall not describe here, but merely point out, are



partly spiritual and partly temporal. But even these latter are based upon and rooted in his spiritual office—*beneficium propter officium*, not vice versa.

1. A pastor's *spiritual functions* are either strictly parochial or what might be called moral. The *strictly parochial* functions are enumerated fully in can. 462. They are chiefly: the right to confer baptism, to assist at marriages, to bring the viaticum to the sick, and to perform the funeral service. Another strictly parochial duty is the application of the Mass for the people, as stated under can. 466, and that of residing in the parsonage near the church, as set forth in can. 465.

The moral or *official*, though not strictly parochial, functions of a pastor are the exercise of the cure of souls towards all the parishioners (can. 464, § 1). This comprises the holding of divine service, the administration of the Sacraments, pastoral vigilance and charitable attendance, and care for the education of the young. Diligent care should especially be given to the poor and sick, also to warding off any dangers to faith and morals

that may threaten the children in the schools.<sup>42</sup>

2. The *material* functions of a pastor are the following:

a) All pastors, whether canonically so called or not, are entitled to the *fees* or dues established by either approved custom or lawful taxation, which latter must be determined by a provincial council or meeting of the bishops of the province. If priests charge more than custom or the law allows, they are obliged to restitution. The word *exigens* in can. 463, § 2 must be interpreted strictly, *viz.*, of charging or demanding, whether this be done from the pulpit or privately. More abundant offerings given voluntarily do not oblige to restitution. On the other hand, the Code rules that pastors should not refuse to serve the poor free of charge.<sup>43</sup> Those, however, who are able to pay, are liable to punishment, to be inflicted by the local Ordinary, in case they refuse<sup>44</sup> to pay the lawfully estab-

<sup>42</sup> Can. 467-469.

<sup>43</sup> Can. 463.

<sup>44</sup> Can. 2349, which refers to can. 463 and can. 1507. Sometimes the material element prevails over the spiritual, in terms which might be excusable at an auction sale, but not in a Catho-

lished dues. Pastors, however, are not supposed to inflict punishments of a public nature, because they lack jurisdiction in the external forum. Hence, to threaten refractory parishioners with ecclesiastical punishment, or perhaps censures, or the refusal of absolution, would be exceeding the pastor's rights or powers. All he is allowed to do is to read can. 2349 to such recusants; the rest he must leave to the Ordinary.

2. Pastors who have a canonically established parish and are therefore beneficiaries in the strict sense, are entitled to all the temporal rights connected with their benefice.<sup>45</sup> For they really hold the parish *in titulum*, not merely *in commendam*; they are freeholders to the extent that they make use of the fruits of the benefice in as far as these are necessary for their decent support. But what is left after the expenditures for such a decent support have been deducted, they are in justice bound to apply to the poor or to charitable

lic Church. However, it should also be said that such conduct is sometimes prompted by pressure from above—of almost incredible intensity.

<sup>45</sup> Can. 1472.

purposes.<sup>46</sup> In many dioceses the salary is barely sufficient. In other dioceses, where the salary is somewhat better, generally the expenses are higher. Besides, even priests are allowed to put something by for a "rainy day" (sickness or disability), when hospital bills—some of our so-called charitable institutions should be placed in a different category—and other bills have to be met and the diocesan funds are insufficient. This all the more since our American clergy abhor the idea of being treated like paupers or charity patients. From this we conclude that the law mentioned above, *viz.*, to distribute to the poor, etc., the superfluous income has really but little practical value.

The beneficiary pastor must administer the property of his parish according to law. If he has been culpably *negligent* in the performance of this duty, he is bound to repair the damage. The ordinary expense of administration and of collecting the revenues must be borne by the beneficiary.<sup>47</sup>

3. In order to keep an "orderly house," the

<sup>46</sup> Can. 1473; see our *Commentary*, Vol. VI, 537.

<sup>47</sup> Can. 1477.

law requires that pastors should keep *parish books* for the registration of baptisms, confirmations, marriages, deaths, and the reports of a census. Of the first four an authentic copy must be sent every year to the diocesan court.<sup>48</sup> The Code does not require pastors to send their ledgers or journals to the diocesan chancery for inspection.<sup>49</sup> Neither does it prescribe in what language the books are to be kept. If the parish is Italian or Polish, and the trustees of the same nationality, it appears but natural that the books should be kept in these respective languages. However, if the parish is incorporated by the State, the latter will demand that the books and minutes be kept in the English language, a clause which is generally inserted in the by-laws.

4. The time from which the functions of the pastor go into effect and can licitly or validly be performed, is *the moment when he lawfully takes possession of the parish*. The usual mode of taking possession is that

<sup>48</sup> Can. 470.

<sup>49</sup> Can. 1535 demands an annual account to be given to the bishop, which, however, cannot be construed into sending him the ledger or journal.

called in law *installation* or *institutio corporalis*, which either the bishop himself or his delegate, generally the rural dean, performs. We say "the usual mode," for the Code permits any custom, whether solemn or simple. But the Ordinary is entitled to fix a certain date which, if culpably and inexcusably neglected, would entail the loss of the parish after a declaratory sentence.<sup>50</sup> Either before or in the act of taking possession, the *profession of faith* must be made into the hands of the local Ordinary or his delegate, and every time a pastor is changed to another parish, the profession of faith must be repeated.<sup>51</sup>

#### 4. Assistant Pastors<sup>52</sup>

Here is the place to mention the clergymen who assist the pastor. One of the rights or duties of pastors always was the selection and appointment of assistants or curates. In or-

<sup>50</sup> Can. 1443 f.

<sup>51</sup> Can. 1406, § 1, n. 7; and § 2. To this must be added the Antimodernistic Oath.

<sup>52</sup> See D. Lindner, *Die Anstellung der Hilfspriester*, in *Münchener Studien zur hist. Theologie*, Heft 3, 1924.



der to understand this right or duty, some historical remarks are necessary.

As long as there was but one parish in every diocese, all the clerics were not only ordained, but also assigned to their respective places and offices by the bishop. For ordination spelled appointment, since absolute ordination, *i. e.*, ordination without a certain and determined sphere of activity, or ordination without the title to a fixed benefice, was considered against the law, if not invalid. This was the rule for each and every clergyman, according to canon 6 of Chalcedon (451). And this rule certainly prevailed also with more or less stability in regard to what we now call, in broad terms, assistants or curates.

The office of assistant pastor grew out of the various degrees of the minor offices to be performed in church. These minor offices consisted not only of those attached to the so-called minor orders, but also the recitation or chanting of the Divine Office, assistance at liturgical services, assistance in the administration of the Sacraments and at sickcalls, at burial services, etc. After the common life ceased in the XIth and XIIth centuries, the pastors

had to instruct beginners in Latin and the chant. Such minor clerics were later on employed as helpers. When these minor offices, especially those of sexton or janitor and of "reader," were committed to laymen, the time for staying in minor orders was limited and that for ascending to the priesthood hastened. But throughout this period, well into the XIIth century, the ancient practice of ordaining each cleric for a determined church, which he was not allowed to leave at will, was retained. Therefore it was the *bishop of the diocese* or his representative, especially the archdeacon, who appointed clerics to the various parishes.

A decided change came in the twelfth century, when clerics became more numerous and many, especially in the larger parishes, enjoyed ample revenues. Therefore some synods, like that of Avranches in 1172, ordered pastors whose income was sufficient to employ other priests in the cure of souls.<sup>53</sup> This became all the more necessary when bination,—formerly priests said two, three, and more Masses a day,—went out of custom.

<sup>53</sup> Mansi, *Collectio Conciliorum*, XXII, 1157.

The violation of the law prohibiting absolute ordination had the evil effect of producing many unemployed clerics, especially priests, —a kind of clerical proletariat.

Thus it came about that *pastors themselves* employed their helpers, who went by various names: *viceplebani*, *vicepastores*, *adiutores mercenarii*, *auxiliares*, *cooperatores*, *coadiutores*, *provisores*, *vicarii*, *socii parochi*, etc. From the twelfth century up to the time of the Council of Trent (1545–1563) many pastors acted as if they were the employers and the assistant priests mere employees, whom they could hire and dismiss at random. The salary of these assistants was regulated by a private contract, unless the parish itself claimed a right in the appointment, which it frequently did, especially when it had subsidized the endowment or founded a benefice or chaplaincy. As a rule the *salary* of an assistant pastor consisted in board and lodging in the parish house, together with a small pecuniary stipend, sometimes also a share in the stole fees and the oblations of the faithful. The law of supply and demand played its part as well as the greater or less generosity

of the individual pastor. The Council of Trent did not abolish the right of pastors to choose their assistants, but it paved the way for a reform of the existing evils. It allowed the bishops to compel pastors to take as many assistants as were necessary for the care of souls,<sup>54</sup> and made the employment of coadjutors dependent on the will of the bishop by submitting them to approbation for hearing confessions.<sup>55</sup> Thus the pastors were gradually forced into dependence on the bishop's approval for taking assistants in the care of souls. It was a natural development that the dismissal of assistants was also regulated or made dependent on the will of the bishop. The beginning of the XIXth century brought about a change in the relation of curates to their pastors. For the scarcity of priests after the French Revolution made it necessary for pastors to ask the bishop for assistants, not only on account of the pecuniary support, but also for the reason just mentioned, *viz.*, the scarcity of priests. During the first five decades of the past century we see a grad-

<sup>54</sup> Sess. XXI, cap. 4, *de Ref.*

<sup>55</sup> Sess. XXII, cap. 5, *de Ref.*

ual change in favor of episcopal authority throughout Europe. In *our country*, too, the bishops had almost full sway with regard to the appointment of assistants, due to the limited number of priests.<sup>56</sup> *Canada's* bishops pronounced this principle in a provincial council held at Quebec.<sup>57</sup>

Rome was rather reserved until the Vatican Council, when many bishops asked for an easier mode of removing pastors. This naturally led to a consideration of the condition of curates. The decree "*Maxima cura*" of Aug. 20, 1910, introduced the administrative way of removing pastors, but it also dealt, indirectly at least, with the removal of all movable officers. The Code rules very categorically in this respect: "Not to the pastor, but to the local Ordinary, after having asked the pastor, belongs the right of appointing assistants from among the secular clergy."<sup>58</sup> It is not superfluous to stress the clause "*audito parochi*," because can. 105 de-

<sup>56</sup> The First Provincial Council of Baltimore (1829) mentions "*alios sacerdotes postea deputatos, adiutores parochi habendos, donec aliter Praesul statuerit.*" N. IV (*Coll. Lac.*, III, 26).

<sup>57</sup> *Coll. Lac.*, III, 657.

<sup>58</sup> Can. 476, § 3.



mands this "hearing of the pastor" for the validity of the appointment. And if the validity is jeopardized, what about, for instance, can. 1096 concerning general delegation for valid assistance at marriages? Such considerations ought to render Ordinaries very careful in appointing assistants or curates to pastors, not to speak of the natural courtesy they owe to their own helpers.

Consequently also the *removal* of assistants is reserved to the bishop. Thus can. 477 rules: "Secular priest assistants may be removed by the bishop *ad nutum*, or by the Vicar Capitular, but not by the Vicar-General, unless he has a special mandate. If a benefice is attached to the vicar's office, the coöperator (assistant) may be removed upon trial, conducted according to law, for reasons which admit the removal of a parish priest, but also for any grievous insubordination shown to the parish priest in the exercise of the ministry." Since there are hardly any canonically established benefices for assistants, their tenure depends entirely upon the prudent judgment of the local Ordinary.

This legislation seems somewhat harsh, yet



it cannot be denied that the *suprema lex*, i. e., the welfare of souls, is best served in this way. The former practice exposed the assistants to arbitrary treatment on the part of the pastors, while now they are raised to the sphere of public law and interest.

We will add here one more strict obligation, incumbent especially on pastors, but also, to some extent, on assistants. It is the penal sanction attached to the attempt of *arousing the congregation by taking up subscriptions (straw votes, signatures) against a lawfully decreed removal*. Priests who do this are liable to suspension and other arbitrary punishments.<sup>59</sup>

## SECTION II

### THE PARISHIONERS

#### I. *Who are Parishioners?*

Supposing Baptism in the Catholic Church (can. 87), parishioners are called the members of a determined parish, generally living

<sup>59</sup> Can. 2337.

within defined boundaries. If we say "generally," the explanation lies in can. 216, § 4, where national and family or personal parishes are mentioned. However, enough was said of these on a previous page.

Concerning national parishes, a decree of the S. C. of the Propaganda must find a place here. The matter was proposed by the then Apostolic Delegate, Cardinal Martinelli, thus: "Since there are in the U. S., within the same territory, several quasi-parishes to accommodate people of different nationalities, some questions have arisen regarding the claims of jurisdiction over the children born of parents belonging to these respective parishes, as well as over immigrants who, though coming from foreign countries, nevertheless know the English language."

The *reply* of the S. Congregation was:

1. The *children* born of parents who, having come from abroad, speak a language other than English, are not bound, after they have become *emancipated*, to remain in the parish to which their parents belong, but are free to join any quasi-parish in which the language of the country, that is English, is spoken.

2. Catholics (adults) who are not natives of America, but know the *English language*, have the right to become members of the church in which the English tongue is used; and are not obliged to submit to the jurisdiction of the rector of the church erected for the people who worship in a foreign tongue.<sup>60</sup>

From this decision, which is a very particular one, it would follow that *children* of foreigners, as long as they are not emancipated, belong to the church of their parents, provided the latter belong to a church of a 'foreign tongue. Emancipation we take in the sense of the Code, which calls those of age who have completed the twenty-first year.<sup>61</sup> *Adult* immigrants born abroad, who speak the English language, may join an English-speaking congregation. That they can change to and fro at random is not stated in the decision. Nor is it stated that the pastor of the English-speaking parish has any jurisdiction over the children of foreigners if

<sup>60</sup> *S. C. de Prop. Fide*, April 26, 1897 (*Eccl. Review*, Vol. XVII, July 1897, p. 87); the decree has not been inserted in the *Collectanea P. F.*

<sup>61</sup> Can. 88, § 1.

these children attend the parochial school of the English-speaking parish.<sup>62</sup>

This decree leads us to a consideration of the *means by which one becomes a parishioner*. Domicile or quasi-domicile establishes the fact that one is a member of this or that parish.<sup>63</sup> *Domicile* is effected by either the intention to remain somewhere permanently, or by an actual ten years' stay in one and the same parish or place. A quasi-domicile is acquired by actually staying in one place for the greater part of a year, or by the intention to stay that long.<sup>64</sup>

With regard to *children* the Code rules that the domicile or quasi-domicile of the father (in case of illegitimate or posthumous children, that of the mother) is decisive. A minor who has passed the seventh year of age may acquire a quasi-domicile of his own; otherwise minors follow the domicile of those to whom they are subject, *i. e.*, of their parents or guardians, unless these are remiss.<sup>65</sup>

<sup>62</sup> The comments of the editor of the *Eccl. Review* are somewhat wider than the wording of the decree allows.

<sup>63</sup> Can. 94, § 1.

<sup>64</sup> Can. 90; can. 92.

<sup>65</sup> Can. 93.

With regard to *wives* the Code says that, as long as they are not legitimately separated from their husbands, they follow the domicile of their consorts. Yet even a wife who is not yet lawfully separated from her husband may acquire a quasi-domicile; if she is lawfully separated, she may also acquire a domicile. But what if a wife separated from her husband obtains the custody of the children by a decree of the civil court? Do the children follow the mother's domicile or quasi-domicile? Can. 89 says that minors, in the exercise of their rights, remain subject to the power of their parents or guardians, except in matters in which the law itself exempts them from the parental power. This would give the mother the right to determine the domicile or quasi-domicile of her minor children, unless a minor older than seven years should make up his mind to acquire a domicile of his own.<sup>66</sup>

With regard to the different *rites*, the general division of which is that into Oriental and Latin, the Code rules that every Catholic belongs to the rite in which he was *baptized*.

<sup>66</sup> *Ibid.*

This is the rule. But in case Baptism was unlawfully administered by a minister of that other rite, or in case of necessity or by a special papal indult, Baptism in that other rite does not count as determining the rite of the one baptized. The wife who belongs to another rite than her husband may freely join the rite of her husband, and after the dissolution of the marriage is free to return to her own rite. The clergy should never in any way attempt to induce Catholics of the Latin rite to join an Oriental Rite, or conversely. Children must be baptized in the rite of the father, if he is a Catholic, otherwise in that of the mother.<sup>67</sup>

Special rules have been issued with regard to the *Ruthenian congregations* in the U. S.

(a) In places where they have no church or priest of their own rite, they may conform to the Latin rite; also where they live at too great a distance from a Ruthenian church.

(b) Those who have acquired a permanent domicile in the U. S. may pass over to the Latin rite, provided they have obtained, in each individual case, the permission of the

<sup>67</sup> Can. 98; can. 756.



Holy See (*viz.*: the S. C. for the Oriental Rite).

(c) Otherwise the Ruthenians are subject to their own pastors and bishops, to whose maintenance they are bound to contribute; stole fees and other taxes are regulated by the local Ordinaries, who must, however, hear the advice of the Ruthenian bishop.<sup>68</sup>

## *2. Rights and Duties of Parishioners*

We repeat that parishioners are not, in the canonical sense, members of a corporation. For the bearer or subject of all parochial and property rights is the juridical person of the parish church. Its authority or syndic is the bishop or pastor with the consent of the bishop. The end or purpose of a parish is the orderly administration of the spiritual and temporal goods, as far as the common law determines it. Yet even thus the parishioners have certain rights and consequently also certain duties, both being coterminous.

1. As the pastor is obliged to minister to the

<sup>68</sup> Pius X, "*Ea semper*," June 61, 1907 (*Eccl. Review*, Vol. XXXVII, 513-520).

spiritual wants of his flock, so the parishioners are *entitled to a regular and orderly care of their souls*. Therefore the *sanctifying Church* invites to the reception of the *Sacraments and sacramentals* as far as the law permits, and provided the parishioners have not forfeited this right through their own fault.

(a) Parishioners should bring their children for *Baptism* to the parish church, unless distance or other circumstances justify a departure from this rule.

(b) Concerning *Confirmation*, no special church or parish is assigned in law.

(c) Neither are the parishioners limited to their parish church for their *annual confession* (Easter duty).

(d) But they are exhorted to receive the *paschal communion* in their own parish church; those who have received it elsewhere should inform their pastor of the fact.

(e) Extreme Unction and the Viaticum, the administration of which is a strictly parochial right, should be received by the parishioners at the hands of their own pastor or his assistants.

(f) The names of all secular candidates for

*holy orders* must be announced in the parish church.

(g) Catholic *marriages* should be celebrated in the parish church. Assistance at marriage is a strictly parochial right, which should not be set aside for purely sentimental reasons. Parishioners are entitled to the nuptial blessing, which they may receive even after they have long lived in wedlock.<sup>69</sup>

Among the *sacramentals* the more prominent are the blessing of ashes, candles and palms. The parishioners should receive these blessed articles from their pastor, hold them in due veneration, and keep them from profanation. Hither also belongs the churching of women (*benedictio mulieris post partum*), as prescribed by the Ritual, but now frequently forgotten.

A sacramental, and a very edifying one, is the *funeral service*. The Church forbids *cremation*, but strongly recommends the full service with solemn deposition and ceremonies.

The church where the funeral service should be held is the parish church, which in

<sup>69</sup> See canons 738, 775, 859, 998, 1101.

case of doubt always enjoys priority. All those who accompany the funeral procession are obliged to obey the orders of the pastor and to refrain from using any forbidden emblems or insignia.<sup>70</sup>

The *teaching office of the Church* offers the parishioners frequent occasions of hearing the Word of God, especially on Sundays and holydays of obligation, and of receiving catechetical instructions.<sup>71</sup>

The *governing Church* opens free access to the Roman Pontiff and to the ecclesiastical tribunals and courts whenever the faithful deem it necessary or proper to ask for a redress of grievances or for settling matters which lie within the domain of ecclesiastical jurisdiction. The Church also allows, nay, wishes the faithful to unite in confraternities, sodalities, and pious unions. She admits all to the religious state and all males to the clerical state, and confers ecclesiastical dignities without regard to social or hereditary conditions.

Finally, the law allows the civil magistrates

<sup>70</sup> See canons 1150, 1203 f.; 1216, 1233; on cemeteries, *infra*.

<sup>71</sup> See canons 1329-1336, 1344; 1384-1405.

to occupy a distinct seat in church.<sup>72</sup> Mention may also be made of the honorary decorations and titles which the Holy See bestows on deserving laymen.

Therefore the Code can justly say that the faithful (laymen) have a strict right to receive from the clergy the spiritual advantages, and more particularly those means of grace which are conducive to their salvation. Among these we may mention frequent communion and the inexhaustible treasure of indulgences. However, all these spiritual rights must be exercised in accordance with ecclesiastical discipline, to which, therefore, parishioners must conform themselves. (Can. 682).

2. Hence the faithful, too, have certain *duties*, which, like those of the clergy, are partly spiritual and partly more or less material.

(a) It is not necessary to insist here on the worthy reception of the Sacraments or on the law which forbids those who have incurred excommunication to receive them. But it

<sup>72</sup> Can. 684; can. 1569, § 1; can. 1263.

may be well to add that the faithful should avoid association with an *excommunicatus vitandus*, except in so far as the law permits.<sup>73</sup>

(b) The faithful are obliged to *profess their faith publicly*, whenever the refusal of such a public profession would imply a denial of the faith or contempt of religion or injury to God and scandal to the neighbors. For reason of the danger involved to faith and morals the faithful are, under penalty of excommunication, obliged to keep aloof from condemned societies which plot against Church or State.<sup>74</sup>

For the same reason, *viz.*, to preserve the faith, the faithful are obliged in conscience to see to it that their children are educated in *schools* where nothing contrary to Catholic faith and morals is taught, and religious and moral training holds the foremost place. Therefore parents and guardians have a strict right, and are under a grave obligation, to procure for their children a Christian education. We need not stress this command of the Church, but will only add that the Church

<sup>73</sup> Can. 2267.

<sup>74</sup> Can. 684; can. 2335.



claims the right,—and it is a natural and divine right which no government can lawfully take away or curtail,—to found not only elementary or grade schools, but also high-schools, colleges, and universities.<sup>75</sup>

But laymen are *not allowed to preach* in church, and this prohibition includes religious who are not of the clerical rank.<sup>76</sup> This is a wholesome rule for more than one reason and has often saved the sacred edifice from becoming a veritable Babel.

(c) Laymen are forbidden to interfere in ecclesiastical elections. Although they may be trustees (as shall be seen later), or beadles, or even chancellors and notaries at the diocesan court when clerics are wanting, they cannot act as notaries in criminal cases of the clergy nor as arbiters in ecclesiastical trials.<sup>77</sup>

In general the rule is that laymen are not allowed to usurp ecclesiastical power, because the Catholic Church is a hierarchic institution, which is clearly distinguished into a teaching and a learning Church, a Church

<sup>75</sup> Can. 1372; can. 1113; can. 1375.

<sup>76</sup> Can. 1342, § 2.

<sup>77</sup> Can. 1592; can. 373; can. 1931.

that sanctifies and one that is to be sanctified, a Church that governs and one that is governed and must obey.<sup>78</sup> Every other notion is a perversion of this divinely constituted society, and will eventually lead to anarchy.<sup>79</sup>

The duty of the parishioners with regard to the material support of the clergy will be considered in the following section.

### SECTION III

#### THE PARISH CHURCH

The place where the parishioners assemble as such and profess to be members of one spiritual society, where most of the Sacraments and sacramentals are administered, where the faithful are strongly exhorted to hear the word of God,<sup>80</sup> from which they are borne to their last resting place, is the parish church. To this, as a necessary adjunct, is added the cemetery. Both the church and the cemetery form the subjects of this section. The church

<sup>78</sup> See can. 107, where the distinction between clergy and laity is said to rest on divine institution; concerning elections, see can. 166.

<sup>79</sup> Cfr. Job X, 22.

<sup>80</sup> Can. 1348.

may be regarded as a juridical entity (*fabrica*) or as a sacred edifice, which aspects are here treated separately.

## Article I

### *The Church as a Fabric*

The church (*fabrica*) is a juridical person which owns all the temporalities that are required for divine worship.<sup>81</sup> Consequently the real owner of the parish church is the parish itself. However, what was said above concerning corporations must be applied here. Especially must the false notion be eliminated that the parishioners are *the* owners of the parish church. Such an idea may suit a Protestant community, but does not agree with the fundamental principles of the Catholic Church.

In the beginning all church property was in the hands of the bishop, who had to reserve the fourth part for the upkeep of the building and its appurtenances.<sup>82</sup> When this fourth was separated from the common diocesan

<sup>81</sup> Wernz, *Ius Decret.*, III, n. 190, ed. 1901, page 216.

<sup>82</sup> See c. 30, C. 12, q. 2.

fund, it became an independent entity, the main administrator of which was the parish priest under the supervision of the bishop. That municipalities claimed some share is intelligible, but not on that account justified, unless admitted by the Church. For also in this case the law holds: Sacred places are exempt from the jurisdiction of the civil authority, and in these the lawful ecclesiastical authority exercises its own jurisdiction.<sup>83</sup>

### *Administration of the Fabric*

History tells that already in the fifth century laymen were administrators or *executores* of parish and other churches. This custom continued throughout the Middle Ages up to the Council of Trent.<sup>84</sup> Even the Code admits such lay administrators, though with certain restrictions. Sad experience taught the bishops of our country an effective lesson with regard to lay *trustees*.<sup>85</sup>

<sup>83</sup> Can. 1182, § 1, § 3; can. 1160.

<sup>84</sup> Sess. XXII, cap. 5 *de Ref.*

<sup>85</sup> See First Provincial Council of Baltimore, 1829, n. IV. (*Coll. Lac.*, III, 27).

*Administration of Parish Churches*

1. The *local Ordinary* should watch carefully over the church property located in his diocese and regulate its administration according to the common law of the Church. For this purpose he should set up a *board of administrators*, consisting of a president, who is the bishop himself, and two or three capable men, experienced, if possible, in civil law. But to this board no relatives in the first and second degree of the local Ordinary can be chosen without a papal indult,<sup>86</sup>—to prevent nepotism and other evils. The local Ordinaries shall call the board together as often as important business is to be transacted, especially in cases of alienation, according to can. 1532.

Alienation, it may here be stated again, means any notable change in the material condition of church property, hence any transfer or exchange either by sale, gift, rent, mortgage, contract, lease or other transaction by mutual consent of the parties concerned. Any alienation, the amount of which exceeds

<sup>86</sup> Can. 1519 ff.

the sum of \$6,000, needs an Apostolic indult, according to can. 1532 or the common law. The special faculties, if asked for and granted, allow the bishop to alienate to the sum of \$10,000, but no farther without a papal indult. If the property to be alienated is worth between \$200 and \$6,000, the local Ordinary needs the consent: (a) of the diocesan consultors or cathedral chapter; (b) of the board of administrators, and (c) of the persons concerned. A sum of less than \$200 requires only the advice of the board and the consent of the interested parties. Almost the same rules hold concerning lease or rent, and they must be applied to any species of contract that would deteriorate the material condition of the church.

If church property has to be pawned or mortgaged, or debts have to be contracted, these same rules must be followed as to the amount, and the administrators and those concerned must first be heard, and an endeavor made to pay off the debt as soon as possible, by annual payments or by means of a so-called "sinking fund." Immovable church property cannot be sold or leased to the adminis-



trators thereof or their relatives in the first and second degree without special permission of the local Ordinary. It is also required that the civil laws concerning contracts should be duly observed.<sup>87</sup>

### *Trustees*

The Code allows laymen to take part in the administration of church property. However, says can. 1521, § 2, "the whole administration must be conducted in the name of the church, and the Ordinary's right of visitation and of demanding a regular account and prescribing the mode of administration must be safeguarded."

Can. 1183 enacts that if other administrators, either clerical or lay, are chosen, these, together with, and under the presidency of, the ecclesiastical administrator, constitute the board of trustees or council of the church fabric. As to the manner of appointing or electing them the Code determines nothing. Hence the rules laid down by the Third

<sup>87</sup> See canons 1532, 1541, 1533, 1538, 1540, 1529.

Plenary Council of Baltimore still hold. They are:

1. The bishop shall decide as to the necessity and number of lay trustees and prescribe the mode of appointing them.

2. If they are to be chosen from among the parishioners, their names must be proposed to the bishop by the pastor, and approval given in writing; but they may be removed by the bishop *ad nutum*.

3. The president of the board of trustees is the pastor, without whose consent no business may be transacted.

4. If a controversy arises which cannot be peaceably settled between the pastor and the trustees, it must be referred to the bishop, whose decision is final.

5. The *qualifications* of trustees are: (a) they must have performed their Easter duty; (b) they must rent a pew or at least contribute to the support of the church; (c) they must send their children to a Catholic school; (d) they must not be members of any secret or forbidden societies.<sup>88</sup>

<sup>88</sup> *Acta et Decreta*, n. 287.

The Code strictly forbids the trustees to meddle: (1) With the functions of divine worship; (2) With the manner and time of ringing the bells or the order of services in the church and cemetery; (3) With determining the manner of taking up collections, making announcements, and other acts which refer to divine worship or the adornment of the church, and are performed in the church; (4) With the arrangement of the altars, communion rails, pulpit, organ-loft and organ, seats and benches, collection boxes and other things belonging to divine service; (5) With the admission or rejection (because of unfitness according to traditional usage or the laws of the Church) of sacred utensils and other things destined for divine worship or for the embellishment of the church or the sacristy; (6) With the manner of writing, arranging or keeping the parochial books (can. 470) and other documents which belong to the archives of the church;<sup>89</sup> (7) To institute or contest a lawsuit in the name of the church without

<sup>89</sup> The exclusive administrator of *offerings* made in favor of a parish church or of a church located within the boundaries of a parish or mission is the pastor, and the trustees are forbidden to meddle with this matter. (Can. 1184).

having obtained written permission from the local Ordinary, or in urgent cases, from the rural dean, who shall immediately inform the Ordinary when he was granted such a permission.<sup>90</sup>

### *The Duties of Trustees*

The duties of parish trustees and of all administrators, inclusive of the pastor, are thus stated in law:

(1) They should see to it that nothing entrusted to their care is lost or damaged;

(2) They shall observe the rules laid down by both ecclesiastical and civil law, and the regulations imposed by the founder or donor, or by lawful authority;

(3) They shall collect the revenues and fees at the proper time, keep them safely, and use them in accordance with the will of the founder and the rules of the charter;

(4) They shall invest the surplus profitably, with the consent of the Ordinary and to the advantage of the church;

(5) They shall keep the books of income and expenditure in good order;

<sup>90</sup> Can. 1526, 1523.

(6) They shall keep the holographs and title deeds of the church in good order and place them in the archives or safe of the church, and copies or abstracts in the diocesan archives or safe.

The *official obligations* incumbent on the trustees for reason of excess of power or forsaking the office are stated thus:

(a) The church is not responsible for contracts made by the administrators without the permission of the competent superior, unless the contract is favorable. If the trustees exceed the limits and mode of ordinary administration without having obtained the necessary written permission of the local Ordinary, they act invalidly. The sum which would indicate an excess of power must be gauged by that of alienation. *Ordinary* administration, as a rule, means financial transactions, acceptance or refusal of legacies, building and repairing, imposing taxes or prescribing special collections.

(b) Administrators are obliged to make restitution if they relinquish an office which they have either explicitly or tacitly assumed

and thereby cause loss to the church; this rule holds even though they were not bound to act as administrators by reason of an ecclesiastical benefice or office; in other words, even a lay trustee who causes a loss to an amount which by the laws of sound morality obliges to restitution, must consider himself bound in conscience to repair the loss.<sup>92</sup>

An incidental question: *Are lay trustees entitled to compensation or salary?* *Per se*, or objectively speaking, trustees are entitled to a just reward for their work, the amount of which, however, must be settled by the Ordinary, not by the trustees themselves. On the other hand, the pastor is not entitled to an "extra" or additional recompense for the ordinary or usual work connected with the administration of the parish property. It may be added that if a trustee is slack in the support of the church, or perhaps financially less favorably situated, he may make up his shortcomings by the work attached to his trusteeship.<sup>93</sup>

<sup>92</sup> Can. 1527 f.; see our *Commentary*, Vol. VI, 589.

<sup>93</sup> Mathaeus a Coronata, *De Locis et Temporibus Sacris*, 1922, page 58.



*Upkeep and Repair of the Church*

Following the Council of Trent,<sup>94</sup> the Code in can. 1187 permits a dilapidated church, which is unfit for use and has absolutely no funds from which repairs might be made, to be turned to decent profane purposes by the Ordinary. If the church is a parish church, all the obligations as well as the revenues and the title must be transferred to another church. However, the Ordinary should try rather to find ways and means to repair the dilapidated church, because the Code speaks conditionally. But if there are no means available to repair it, the local Ordinary may reduce such a church to profane, though decent, uses—*ad usus profanos*, for instance, as a warehouse or cold-storage plant, etc. May a church be *sold*? It may, after the bishop has given it over to profane uses, because by that very fact the church has, according to can. 1170, lost its blessing or consecration. There is *no special ceremony* required for turning a church to profane uses: a simple declaration on the part of the bishop is suffi-

<sup>94</sup> Sess. XXI, cap. 7, *de Ref.*

cient. If a church is torn down, or if large parts of the walls have collapsed, the consecration or blessing is lost. Note, however, that the altar, if entirely consecrated (*altare fixum*), does not lose its consecration, even though the church is turned to profane uses and therefore execrated.<sup>95</sup> A fixed altar loses its consecration only if the table is separated from the support or by an enormous fracture (can. 1200). Consequently, if a church is to be turned to profane uses and its fixed altar was consecrated, the bishop or pastor must see to it that the altar is taken apart or broken, before the building is given over to other uses or torn down. A portable altar, consisting of the stone only, is easily removed.

*Who is obliged to defray the expenses* for the necessary repairs of a church? Canon 1186 answers this question as follows:

1. The duty of repairing the *cathedral church* rests on the following in the order named:

(a) "On the church funds, after deducting the expenses necessary for the upkeep of divine worship and the ordinary administration

<sup>95</sup> Can. 1200, § 4.

of the church";—which supposes the possession of a capital consisting of either movable or immovable property (endowment).

(b) "On the *bishop* and *canons* according to their respective income, after deducting support." Income, according to all authors, ancient and modern, is understood to accrue exclusively from the revenues of the benefice or office, to the exclusion of patrimonial and personally industrious income. Consequently, if the salary of the bishop, as bishop of the diocese, is barely sufficient for his support, he is not obliged to contribute to the expenses of repairing the cathedral church. The same rule holds with regard to canons.<sup>96</sup> Our diocesan *consultors*, who receive no salary as such, cannot in justice be compelled to contribute to this purpose. Neither can the diocesan clergy, in virtue of the common law now in force, be taxed for repairing the cathedral.

(c) "On the faithful of the diocese, whom, however, the Ordinary should induce by per-

<sup>96</sup> Merely honorary canons, therefore, cannot be obliged to contribute.

suasion rather than compulsion to contribute to the necessary expenses according to their means." Evidently the Code wishes to impose no legal duty on the faithful. In other words, bishops have no power to "tax" other parishes for the repairs of their cathedral church, but they could impose an "extraordinary and moderate fee" on the faithful for this purpose if no other means were available (can. 1505).

The initial clause of can. 1186 should also be taken into consideration: "With due regard to special and lawful customs and concordats and to the duty imposed by civil laws." Here three sources are admitted besides the common law. First *lawful customs*, that is to say, customs which contradict neither the divine nor the natural law, are not reprobated by the Code,<sup>97</sup> and have a standing of at least forty years. There is one safe rule: A custom must be reasonable, which means that the economic conditions of the diocese and parish must be taken into due consideration. Any demand which would

<sup>97</sup> Can. 27.

put a heavy burden upon the faithful or deprive them of the necessary support would be unreasonable.

It is easy to say: They can afford to give a month's wages within a certain period. Such a demand may mean hardship and privation for many a family. We are aware of the commandment of the Church inserted in the catechism of our country: "Thou shalt contribute to the support of the Church." But when the faithful pay their pew-rent and maintain their school,—sometimes with immense sacrifices,—the command of the Church is amply complied with, and no further demands can lawfully be made.

*Concordats* sometimes stipulate the contribution which the civil government has to make towards the upkeep of churches.<sup>98</sup> A third source may be a direct *civil law* which imposes a tax for church purposes. We have no such laws in our country.<sup>99</sup>

<sup>98</sup> See our *Commentary*, Vol. VI, page 60f.

<sup>99</sup> In Italy, where the government has taken over all the revenues of all the churches, there exists a *fondo per il culto*,—much diminished at present; France, after the unwarranted wholesale spoliation of the Church, allowed a certain sum for the *associations de culte*, which was rejected by the Holy See.

2. The duty of repairing the *parish church* rests upon the following in the order named: (a) on the church fund, as described above; (b) on the advowson or *patronus*; (c) on those who receive some income from the church, in proportion to the rate of such income, to be fixed by the Ordinary; (d) on the parishioners. Under (c) the *pastor and his assistants* (curates) are, first and above all, intended. The salary of these is church money, which, indeed, serves as their support, but if anything is left over, belongs to the church and the poor.

It may be pertinently asked: Is the salary of our parish priests such as would make them amenable to an involuntary contribution imposed by the bishop? We leave that to the bishops to decide, but according to what was said above, the salary of our priests would hardly justify such an impost.

Others who derive some benefit from church money are all those who receive a salary from the church fund: janitors, organists, pensioners, etc. All these are obliged *pro rata*, after deducting a decent or propor-



tionate support.<sup>100</sup> If a monastery or a university possesses a parish incorporated *quoad temporalia tantum*, it is obliged to help keep it in repair.<sup>101</sup>

Here again it must be noted that only the revenues derived from that particular church to the upkeep and repair of which these are supposed to contribute is to be reckoned; personal or patrimonial income is not taxable. Nor are those in question bound to contribute toward the repair of other churches besides their own.

"On the *parishioners*, whom the Ordinary should exhort rather than compel to contribute." What was said above with regard to the cathedral, applies in proportion to the parish church. The Code indeed is very lenient in this case,—evidently for a reason.

According to the Code there is a gradation in the obligation to repair. The question may arise: If the first source (*viz.* the church revenues) is sufficient to defray the expenses of upkeep and repair, are the persons enum-

<sup>100</sup> *Trid.*, Sess. XXI, c. 7, *de Ref.*; Bened. XIV, *Institutiones*, 100, n. XIII.

<sup>101</sup> S. C. C., March 11, 1711 (Richter, *Trid.*, p. 121, n. 6).

erated under b, c, and d free from obligation? The answer is yes, inasfar as a juridical duty is concerned, although a moral obligation may still remain if the first mentioned should be too heavily burdened.<sup>102</sup>

What has been said with regard to the repair of the Church, applies *ex aequo* to the parsonage, the sacred vessels, vestments, and furniture,<sup>103</sup> and in our country also to the upkeep of the parish school.

### Parish Contributions

Here is the proper place to comment on certain other contributions, to be made by the parish as such. We say "as such," in order to distinguish the parish from the beneficiaries. The Code itself draws a distinction between both kinds of contributors. The taxes or contributions which the common law allows to be imposed on parishes are the seminary tax, the cathedraticum, and the pension.

1. The *seminary tax* must be paid by *all parishes and quasi-parishes*, even though they

<sup>102</sup> Mathaeus a Coronata, *l. c.*, p. 67.

<sup>103</sup> Thus all authors; see Wernz, *Ius Decret.*, III, p. 435; n. 434; Mathaeus a Coronata, *l. c.*, p. 97.

have no other income than the free offerings of the faithful. This tax must be general, equal, and proportionate. It is *general* if no exception is made in favor of any parish; it is *equal* if pro-rated with the revenues; it is *proportionate* if demanded in proportion to the needs of the seminary. For the seminary tax should be diminished if the revenues of the seminary increase, and the maximum rate must not exceed 5% of the income of the parish, after all obligations and expenses have been deducted.

If the whole income of a parish consists of free offerings of the faithful, it is not taxable.<sup>104</sup> The conclusion then would be that most of the parishes of our country would not be liable to contributions; for the income of most of our parishes consists of free *oblaciones*,—pew-rent, plate collections, subscriptions, etc. Of endowment, in the strict sense, there is, as far as we know, little or none. However, custom has sanctioned the assumption that these *oblaciones certae et voluntariae fidelium* (can. 1410) constitute a sure and stable income, which thus forms a

<sup>104</sup> Can. 1356.

basis for taxation. At the same time we must note what the Code says with regard to really taxable capital, *viz.*, the sum total left over after all the obligations and expenses have been met. Thus, as already stated when speaking of pensions, if the income of a parish is \$4,000 and \$1,000 is left after the legitimate deductions are made, the \$1,000 would be taxable at 5% for the seminary. Therefore the bishop would exceed the power granted him by the Code or common law if he would tax the gross amount of \$4,000, demanding \$200 as seminary tax. We speak of strict taxation here. It is also absolutely certain that the Council of Trent as well as the Code has only *clerical seminaries* in view, *viz.*, nurseries for vocations, especially of native young men, to the priesthood. The consequence is that a high school or college to which all kinds of students bent on diverse pursuits are admitted, cannot be called a clerical seminary, while a "junior clerical seminary"—provided this title is not merely a pretext—really deserves the name of seminary. Another consequence is that the Ordinary has no right to levy the seminary tax permitted

by law for the benefit of institutions which do not properly fall under the term "seminary."

The Code (can. 1355, n. 2) permits the bishop "to command the pastors and other rectors of churches, even though they be exempt religious, to take up collections for that purpose at stated times." Over and above the tax already mentioned a collection for the seminary, if there is no sufficient endowment, may be taken up at fixed times. This is generally done on Christmas day or Easter Sunday. The seminary, needless to add, should be proportionate to the needs and means of the diocese.

2. The *cathedraticum* must be paid annually by *all churches* and benefices subject to the jurisdiction of the bishop, as well as by lay confraternities. This contribution, according to the Code, is a sign of subjection, just as the monasteries which were under the special "protection of St. Peter or the Holy See" had to pay an annual tribute to the Apostolic Lord. Therefore, the original and canonical meaning of *cathedraticum* is not support of the bishop, but reverent subjection to him. This was a quite natural arrange-

ment in the first five or six centuries when the bishops were entitled to the fourth part of the diocesan income, which then was a common *massa*. It took on added significance when the bishops received an endowment, not only from church revenues, but also from other sources of a more secular nature. In those days and countries the *mensa episcopalis* sometimes recalled the "seven fat years." But this was not the case in our country when the hierarchy was first erected. No one doubted the correctness of the statement of the VIIIth Provincial Council of Baltimore (1855) that a bishop was entitled to a "befitting sustenance" (*idonea sustentatio*) from the revenues of his diocese. This council ordained that the tenth part of all the revenues of "each church in which the care of souls is exercised," belonged to the bishop. The revenues mentioned are: pew-rent, regular Sunday collections, stole fees from baptisms and marriages.<sup>105</sup> Rome was not entirely willing to accept the arrangement, but suggested that the cathedraticum be fixed *collatis consiliis* at the diocesan synod, so that

<sup>105</sup> *Acta et Decreta*, n. VII (*Coll. Lac.*, III, 162).



this matter would be not a provincial, but a diocesan affair.<sup>106</sup> Evidently the Council of Baltimore had tithes in view when it enacted that the contribution for the support of the bishop should not exceed the tenth part of the revenues. The S. Congregation did not object to the amount as much as to the settling of the problem by a provincial council, regarding it rather as a diocesan affair. As a consequence it was inserted in most of the diocesan statutes, which also determined the amount of the so-called cathedraticum. For with the exception of a council of New Orleans, which employed the term "*ius cathedraticum*,"<sup>107</sup> American councils speak of it as "*idonea sustentatio*," "*certa pensio*," "*decens sustentatio*," and in similar terms.<sup>108</sup> No doubt the Fathers had some misgivings as to the correctness of the term "cathedraticum" for *mensa episcopalis*. Does the Code condemn the custom prevalent in this country? This can scarcely be affirmed. For can. 349, § 2, n. 1 permits bishops to receive the reve-

<sup>106</sup> S. C. P. F., Feb. 16, 1857; July 16, 1872 (*Coll. Lac.*, III, 201, 1085).

<sup>107</sup> A. D. 1856 (*Coll. Lac.*, III, 242).

<sup>108</sup> *Coll. Lac.*, III, 429; 755.

nues of the *mensa episcopalis* from the day they take possession of their diocese. On the other hand, the Code wishes that particular statutes and praiseworthy customs regarding tithes be kept up. If these contributions are really meant as *cathedraticum*, we have our doubts as to whether the Code or the S. Congregation of the Council would give their approval.<sup>109</sup> The Council of Westminster, held under Cardinal Wiseman, in 1855, left open the question whether the *cathedraticum* was intended for the support of the bishop, or simply as such, but fixed the amount at half a pound sterling to be paid by each chapter from the common treasury, by all priests ordained on the *titulus missionis*, who receive a salary from either a church or oratory, by all who exercise the care of souls, and by all who preside over a church or public oratory.<sup>110</sup>

Concerning *pensions* we refer to what we have said above. These are all the exactions allowed by the Code to be imposed on parishes as such.

<sup>109</sup> Can. 1502; S. C. C., March 13, 1920 (*A. Ap. S.*, XII, 446).

<sup>110</sup> *Coll. Lac.*, III, 1022 f. This enactment certainly agrees better with the original meaning of *cathedraticum*.

There is, however, another canon (1505) which allows local Ordinaries *to impose an extraordinary and moderate tax upon beneficiaries, by reason of special needs of the diocese*. This rule comprises all beneficiaries, whether of the secular or the regular clergy. However, they may be taxed only as beneficiaries, *viz.*, only on their ecclesiastical revenues, not on any income they may derive from other sources.<sup>111</sup>

The term *extraordinary* means that this tax must cease as soon as the special needs of the diocese cease.<sup>112</sup> The term *moderate* indicates an objective limit, *viz.*, due consideration of the tax itself and of the salary of the beneficiary. A *diocesan need* is one that concerns the diocese as such, and not some particular church or charitable institution which is not a diocesan institution. However, when we say a particular church we do not include the cathedral, because in our opinion the cathe-

<sup>111</sup> Blat, *l. c.*, p. 502.

<sup>112</sup> This may safely be applied to orphanages and asylums for the aged, provided these are diocesan institutions. Here we cannot forego a timely observation: Why not centralize those diocesan institutions in each State? An immense reduction of expenses would result.

dral belongs to the whole diocese. Therefore, a charitable subsidy demanded of the clergy, either secular or religious, appears to be reasonable if the tax is reasonable and proportionate to the salary. Other needs would be the bishop's *visitatio ad limina* or attendance at a general council. But in no case can personal or family reasons justify such a tax.

What is to be done if the bishop exceeds his power in imposing taxes? There are two canons which refer to this evil practice. Can. 2404 mentions the abuse of ecclesiastical power in general. Can. 2408 more specifically forbids an increase of taxes beyond the customary amount. Although the taxes here mentioned are mainly the stole fees and those for rescripts, yet the principle applies to over-taxation of any kind. There is no definite sanction in law for such excesses. The only way for obtaining redress is by recourse to the Apostolic See, either directly by way of a petition to the *S. C. Concilii*, or through the Apostolic Delegation. From a reliable source we heard that one bishop was warned: "*caveas.*"

*Begging*

There is no bottom to the beggar's bag, as the saying is. Neither is there any limit to the various tricks and contrivances employed in soliciting money for charitable purposes. The Code regulates this matter in canons 1503 and 621-624, the latter dealing with religious.

1. Canon 1503 says: "*Private persons, whether clerics or laymen, are forbidden to collect alms for any charitable or ecclesiastical institution or purpose, unless they have the written permission of the Apostolic See or that of their own and of the local Ordinary.*"

Private persons are all those who beg without official or public capacity, authority or warrant, no matter whether they are clergymen or belong to the laity.<sup>113</sup> A pastor may lawfully collect in his own parish and a bishop in his own diocese because they are officials.

A public corporation or institute, acknowl-

<sup>113</sup> Blat, *l. c.*, p. 500 explains *privati* as *singuli fideles*;—but who are these?

edged as such by either the ecclesiastical or civil government, may licitly solicit alms, because it is public, not private.

*Stipem cogere* means to beg alms. Is the prohibition restricted to personal collecting, or does it extend to begging by letter? Neither the grammatical meaning nor the text itself implies a restriction to personal collecting. Therefore the axiom: "*Ubi lex non distinguit, nec nos distinguere debemus*," should prevail. The only trouble is that letters cannot easily be controlled. Selling tickets or chances may be classed among acts of begging. However, this practice is sometimes regulated by diocesan statute or by custom, which is, as it were, based on mutual understanding and a sort of reciprocal compensation.

The *authorities* here mentioned are either the Apostolic See (*S. C. Concilii*) or the two Ordinaries, *viz.*: the one to whose jurisdiction the person begging alms is subject, and the one in whose diocese he begs.

2. As to *religious*, the Code rules: (a) Mendicant regulars are allowed to beg in



their *own diocese* without the permission of the local Ordinary, provided they are authorized by their own superiors. *Outside* their own diocese they need the written permission of the local Ordinary. (b) Religious who do not belong to the mendicant orders need a special privilege from the Apostolic See, if they are *papal* institutes, and also the permission of the local Ordinary. *Diocesan* institutes must obtain the written permission of the local Ordinary in whose diocese their house is located, *and* that of the local Ordinary in whose diocese they wish to beg. Pastors, therefore, should inspect the letters of authorization when religious present themselves.

3. *Oriental*s, no matter of what order or dignity, whether secular or religious priests, bishops, archimandrites, or patriarchs, must not be given permission to beg by Latin Ordinaries, unless they can produce an authentic and recent rescript issued by the S. C. for the Oriental Church.<sup>114</sup>

<sup>114</sup> Can. 621-622.

Article II

*The Church Edifice*

A parish church may be defined as a sacred building dedicated to divine worship, which serves the parishioners chiefly, though not exclusively, for their public religious service.<sup>1</sup>

I. *The Building*

No church may be built without the express consent, given in writing, of the local Ordinary.

The Vicar-General needs a special mandate for granting this consent. Religious, even though exempt, must obtain it from the local Ordinary in person. This consent should not be given unless the Ordinary is convinced that the necessary means for building and maintaining a new church, for supporting the minister and defraying other expenditures of religious worship, will be forthcoming.<sup>2</sup> Details as to the amount required for starting a

<sup>1</sup> Can. 1161.

<sup>2</sup> Can. 1162.

parish had best be inserted in the diocesan statutes. Experience tells that too heavy a debt discourages both pastors and people.

The *architectural aspect* is touched upon in can. 1164, § 1, which rules that Ordinaries should see to it that new churches are built and old ones repaired in accordance with time-honored Christian tradition and the rules of sacred art. Pope Pius XI has lately given fresh utterance to this truth.

Tastes differ, but a correct taste can be acquired by study and experience. Besides, as the Code itself insinuates, experts should be consulted. One remark may not be superfluous: the practical side should not be sacrificed to architectural considerations. A parish church with immense pillars or heavy columns seems to be impractical, because the center of worship, the altar, can hardly be seen by all.

Finally, a sacred building ought to be made to fit in with the surrounding landscape.<sup>3</sup>

The same canon 1164, § 2 rules that no

<sup>3</sup> Another practical point is good acoustics. Much depends on the height, the material (plastering) used, and the arrangement of the building.

opening or window may lead from the church into the houses of lay people, and that the space underneath the floor and above the ceiling of a church may not be used for profane purposes. Profane purposes would be theatrical entertainments, unless the so-called basement has been built expressly for such a purpose and in such a way that church and basement are as it were two distinct buildings. Above the ceiling of the church there may be a hall, but it must not be used for worldly entertainments, such as dances, balls, fairs, and bazaars. Keeping a school is not a profane purpose, nor would a Sisters' dormitory be objectionable on that score, though no dormitory is allowed immediately above the sanctuary, unless heavy walls intervene.<sup>4</sup>

## 2. *Dedication*

Before a church is dedicated, no divine office may be held therein. The dedication may consist either in consecration or blessing. The Code says that, if possible, parish churches should be consecrated. However, a

<sup>4</sup> See our *Commentary*, Vol. VI, 18 f.

church that is to be consecrated must not be built of wood or of iron or any other metal. A church built of cement blocks, though reinforced with steel rods, may be consecrated, provided the places for the twelve crosses and the door posts of the main entrance are of stone.<sup>5</sup>

Churches which do not come up to these requirements can only be blessed. Stone churches which are liable to be abandoned to profane use, should not be consecrated, but only blessed.<sup>6</sup> Sometimes consecration is deferred until the greater part of the debt is paid, which is in conformity with the Code, on account of the danger of the church being turned over to profane uses.

Before the dedication proper takes place the *cornerstone* is laid.

The laying of the cornerstone of a church is performed by the local Ordinary, if the church belongs to the secular or non-exempt religious clergy. To him, in this case, also is reserved the right of blessing the church. If the church belongs to the exempt religious

<sup>5</sup> Can. 1165, §§ 3 or 4; see our *Commentary*, Vol. VI, 22.

<sup>6</sup> Can. 1165, § 2.

clergy the competent religious superior (general, provincial, guardian, rector) may bless the cornerstone and the church. But the *consecration* of a church, no matter whether it belongs to the secular or regular clergy, is reserved to the local Ordinary, provided he has episcopal orders. The Vicar-General, even if he is a bishop, needs a special mandate from the Ordinary.<sup>7</sup>

Together with the church the *main altar*, or at least one other altar, must be consecrated; this altar must, of course, be a fixed one.<sup>8</sup>

A church is a sacred place and therefore exclusively reserved for divine worship, or the *divina officia*, *i. e.*, all those functions of the power of order which, either by Christ's institution or that of the church, are ordained for divine worship and can be performed only by the clergy. All parochial functions, therefore, which have a divine or ecclesiastical character, can be held in the parish church.<sup>9</sup>

<sup>7</sup> Can. 1155, 1156, 1163.

<sup>8</sup> Can. 1165, § 5; can. 1197.

<sup>9</sup> Can. 2256, n. 1; can. 1171.



As a sacred edifice, and a house of the Lord, the parish church must be kept *neat and clean*.<sup>10</sup> Its condition might be called the barometer of the congregation's practical belief. Everything not in keeping with the holiness of the place must be kept away, especially all kinds of fairs and business transactions, even though they be intended for a holy purpose.<sup>11</sup> Whether a so-called "sacred concert" may be held in church depends on the kind of chant or music offered. Here it may be mentioned that the Code insists on banishing all "lascivious and impure" music or chant.<sup>12</sup> An organ concert directed according to liturgical rules may be tolerated. But the Blessed Sacrament should be removed and care taken, as far as possible, that the sacred character of the edifice be not violated.

### 3. *Desecration, Reconciliation, Interdict*

A church, whether blessed or consecrated,

<sup>10</sup> Can. 1178.

<sup>11</sup> Can. 1178.

<sup>12</sup> Can. 1264, § 2. The liturgicity and rubricality of church music must be left to the authorities; there seems to be a wide scope for subjectivism on this point.

may be desecrated by (a) homicide, (b) injurious and serious shedding of blood, (c) godless and sordid uses, (d) the burial of an infidel or excommunicated person if the excommunication was incurred by either a declaratory or condemnatory sentence. However, these acts must be certain and notorious, and take place in the church itself. Consequently says the Code, if such an act should occur in the cemetery adjoining the church, the latter would not be desecrated.<sup>13</sup>

The *effects* of desecration are that no divine services can be held, no Sacraments administered, and no burials performed until reconciliation has taken place.<sup>14</sup>

The *reconciliation* of a church that was blessed, but not consecrated, can be performed by the pastor or by any priest with at least the presumptive permission of the pastor. A consecrated church may be reconciled by the bishop or the higher religious superior; in urgent and serious cases also by the pastor of the church, who must inform the bishop of

<sup>13</sup> Can. 1172; see our *Commentary*, Vol. VI, 35 ff.

<sup>14</sup> Can. 1173.

the fact after the ceremony if he could not do so before.<sup>15</sup>

If a *parish church* is put under the interdict, the effects of this censure (or vindictive penalty) are as follows:

(a) Only one low Mass may be said, without sacred ministers and without Benediction of the Blessed Sacrament;

(b) Baptism may be administered with all its ceremonies and with sponsors;

(c) The Holy Eucharist and Penance may be administered as usual;

(d) Marriages must be performed without the nuptial blessing;

(e) The burial of the faithful must take place without any ecclesiastical rites, which may, however be supplied after the interdict has been raised.

(f) Baptismal water and the holy oils may be blessed and the word of God may be preached. But without display of *sacra suppellex*, ringing of bells, and playing of organs or other instruments. On Christmas, Easter, Pentecost, Corpus Christi, and Assumption the interdict is entirely suspended.

<sup>15</sup> Can. 1176.

If a cemetery is interdicted, this does not include the adjoining church, but all oratories erected on the cemetery are interdicted.<sup>16</sup>

As in ancient days, so now the Catholic Church claims for her churches the *ius asyli* or right of refuge, so that criminals who flee to them for protection, may not be taken therefrom except with the assent of the local Ordinary or the pastor. Urgent cases, however, excuse from asking this consent.<sup>17</sup>

There are two canons in the Code which contravene certain inveterate customs. One is very emphatic, so much so that it reprobates every contrary custom. It is can. 1181, which forbids gate-money to be charged for admission to sacred functions, which means not only the main service, but any public service. Therefore, the "door dime" should gradually be abolished.<sup>18</sup> This canon, however, does not forbid pew-rent or any other lawful method of raising church funds sanctioned by synods and custom.

<sup>16</sup> See can. 2270-2273.

<sup>17</sup> Can. 1179.

<sup>18</sup> Only last summer I read the following placard in a prominent church: "Those who have no pew put a quarter on the table,"—and I noticed quite a pile of quarters.

Can. 1262 expresses the pious wish that the women should occupy one side of the church and the men the other, as was the custom in former times.

With regard to *bells* the Code rules that every church should have a set of bells, either consecrated or blessed, the use of which depends exclusively on ecclesiastical authority. They may, therefore, not be rung for profane purposes, except in cases of necessity (fire, flood, etc.), or with the permission of the local Ordinary, or by reason of a lawful custom.<sup>19</sup>

Concerning *pews or seats* the Code has the following to say:

(a) Magistrates, *i. e.*, civil officials, are entitled to an honorary place in church, according to their dignity and rank, provided the liturgical laws be observed,—which, as a rule, exclude a seat in the sanctuary.

(b) Without the express consent of the local Ordinary no layman can claim a reserved seat for himself and his family, and should not demand such a seat unless the rest of the faithful are sufficiently accommodated.

(c) A tacit condition of such concessions is

<sup>19</sup> Can. 1169.

that the local Ordinary may at any time, for a just reason, recall the concession, no matter how long it has been in force.<sup>20</sup> The pews belong to the church, and no personal occupation, no matter how long it may have been protracted, can establish any personal or real claim to a pew. It would not hurt the parishioners to hear this canon read once in a while, because undue attachment to certain seats or pews sometimes creates disturbances in a parish.

There is no special law concerning the *organ* or *organ loft*. But it stands to reason that the organ belongs to the church, not to the organist or a clique. Furthermore, the Code provides for the appointment and dismissal of some minor officers or functionaries usually required for functions formerly performed by minor clerics. Can. 1185 says: "The sacristan (sexton), chanters, organist, choir-boys, bell-ringers, grave-diggers and others employed for these minor services, are *employed exclusively by the pastor*, upon whom alone they depend, and by whom alone they are dismissed,—with due regard, however, to legiti-

<sup>20</sup> Can. 1263.



mate customs and concordats and the authority of the Ordinary." Therefore, neither trustees nor certain families, even though they have performed these functions or appointed these functionaries for a long time, can claim a right with regard to them. There can not be a custom in the canonical sense, since a body of trustees or some few families can never induce a custom. Nor does the Church wish that ecclesiastical offices should become hereditary. But neither should assistants or curates, without being commissioned by the pastor, interfere with the appointment, supervision, and dismissal of these officers, since the Code reserves this right to the pastor. Only the local Ordinary is authorized either to hear a case of complaint when brought before him, or to change the appointment, administration, or dismissal if he deems it necessary for the welfare of the parish. But here, too, it cannot be too strongly stressed that the bishop should hear both sides fairly and beware of gossip. By due prudence in these matters he will safeguard the authority of the pastor and spare himself useless worry.

Can. 1524 says that all employers, especially

clerical, religious, and ecclesiastical administrators, must pay the workingmen whom they hire *a decent and fair wage*; must see to it that they are given ample time for their spiritual duties; and are in nowise to hinder them in the performance of their domestic duties and the practice of thrift; nor must they impose on them work beyond their strength, age, or sex. This also applies to the teachers who are employed by the pastor for the parish school.

### Article III

#### *Cemeteries*

1. The Catholic Church has the right to possess its own cemeteries. Where this right has been violated, and there is no way of recovering it, the local Ordinaries shall see to it that the civil cemeteries are blessed, provided the majority of the persons to be buried in them belong to the Catholic faith, or at least that Catholics are granted a separate space, which should be blessed. If not even that much can be obtained, then the single graves must be blessed according to the liturgical books.<sup>1</sup>

<sup>1</sup> Can. 1206.

Each parish should have its own cemetery, unless the local Ordinary assigns a common cemetery to several parishes. The cemetery must be *blessed* either according to the solemn or the simple rite. It should be properly enclosed and kept in good order. There should be a separate plot, properly enclosed and guarded, for the burial of those who are denied ecclesiastical honors.<sup>2</sup>

The *exhumation* of corpses already laid to rest requires the permission of the Ordinary, which shall never be granted if the corpse cannot be unmistakably identified.<sup>3</sup>

2. Although the parish church and the parish cemetery have the primary right to burial service and interment, yet every Catholic may *freely choose* his funeral church and burial place, unless he is expressly excluded from this privilege by law. Practically speaking only religious are debarred from the exercise of this right. For wives and children who have completed the age of puberty (fourteen years for boys and twelve years for girls) can

<sup>2</sup> Can. 1208, § 1; can. 1205, § 1; can. 1210—1212.

<sup>3</sup> Can. 1214.

also assert this right; and for the *impuberes* their parents or guardians enjoy the same power.<sup>4</sup>

Concerning *religious* the law rules as follows:

(a) *Exempt* religious may have their own cemetery without any permission from the local Ordinary.

(b) Religious who are *not exempt*,—to which class most of the female congregations belong,—need a special permission from the local Ordinary to have their own cemetery.<sup>5</sup>

Bodies, except those of residential *bishops* and prelates or abbots *nullius*, should *not* be buried *in church*; and the bodies of these prelates can only be interred in their own churches,<sup>6</sup>—provided the civil law allows it.

### 3. With regard to *burials*:

(a) The pastor is entitled to accompany the funeral cortège from the house of the deceased to the church—where this is customary,—and this even if his deceased parishioner died in

<sup>4</sup> Can. 1212; 1217; 1223 f.

<sup>5</sup> Can. 1208.

<sup>6</sup> Can. 1205, § 2.

another parish, to hold the exequies, and to accompany the body to the grave with the usual ceremonies.<sup>7</sup>

(b) If the deceased parishioner has chosen for his funeral church the church of an exempt religious institute, the pastor may accompany the body to this church, but the exequies are held by the rector of the exempt church. If this church is not one exempt from the jurisdiction of the pastor, he, the pastor, may perform the exequies in this non-exempt church.

(c) Concerning *religious and their novices* (not postulants). If they are *not* exempt from the jurisdiction of the pastor, the pastor has the full right to hold the exequies and bury the body. If they are *exempt* from the jurisdiction of the pastor, the chaplain of the religious institute performs all the ceremonies.<sup>8</sup> In order to understand this fully, can. 464, § 2 should be consulted. The text in can. 1230 mentions "*exemption from the*

<sup>7</sup> Can. 1218, § 1; can. 1230, § 3 requires that the *parochus proprius* should inform the other pastor; cfr. can. 1204; can. 1230, § 1.

<sup>8</sup> Can. 1230, § 5.

*jurisdiction of the pastor*"; and can. 464, § 2 states that the bishop may exempt religious families or charitable institutions from the care of the pastor. Hence in can. 1230 the term "exemption" must be taken in the sense of can. 464, § 2, *i. e.*, in a sense somewhat different from that usually attached to the word. Therefore even a religious institute which would not by its nature enjoy exemption, may be entitled to exemption with regard to funerals, provided the religious superior grants the permission.<sup>9</sup>

(d) *Guests and students* of religious houses and *patients of hospitals* are buried by their own pastors, unless the place where they died enjoys a special privilege, or the local Ordinary has applied can. 464, § 2. But these persons (under d) are entitled to choose their own funeral church and burial place, and consequently the same general rules apply to them as to other parishioners.<sup>10</sup> By reason of a communication of privileges, all regulars may bury their students and persons who have lived under the obedience of the respective

<sup>9</sup> Can. 1228, § 2.

<sup>10</sup> Can. 1222.



religious superior in their own cemeteries. This holds in favor of nuns with solemn vows if they have their own cemeteries. But with regard to the funeral church, the churches of nuns cannot be chosen for outsiders. Only those female servants and women who habitually lived within the enclosure of the convent for the sake of study, or because of sickness, or as guests, may have their funeral services performed in the nuns' church.<sup>11</sup> We emphasize the terms *nuns* (*moniales*) because of the consequence in favor of Sisters whose church may be chosen as a funeral church, provided the Ordinary has given them permission.

4. *Ecclesiastical burial may and must be denied* to the following persons, even though they were members of a parish which possesses its own cemetery and had purchased a lot, provided this lot is blessed :

(a) Notorious apostates from the Christian faith and persons who notoriously belonged to a heretical or schismatical sect, or to other societies of the same kind ;

(b) Persons excommunicated and inter-

<sup>11</sup> Can. 1225.

dicted after a condemnatory or declaratory sentence;

(c) Persons who have deliberately committed suicide, *viz.*, a suicide which a conscientious physician cannot ascribe to physical or mental derangement;

(d) Persons who died in a duel or from a wound received in a duel, which latter term must, however, be interpreted strictly, and not applied to prize-fights or games of chance;

(e) Those who ordered their body to be cremated;

(f) Other public and notorious sinners.

It is supposed in all these cases that the persons concerned gave no signs of repentance before death.<sup>12</sup>

For those who have been deprived of ecclesiastical burial no (public) requiem Mass, no anniversary or other public funeral service may be held. If the body of an *excommunicatus vitandus* has been buried in sacred ground, it should be exhumed, provided it can be done without great inconvenience and the bishop has given his permission.<sup>13</sup> It may be

<sup>12</sup> Can. 1240.

<sup>13</sup> Can. 1241 f.

added that if the *excommunicatus* has been absolved *post mortem*, the privation of ecclesiastical burial ceases.

5. To complete this subject, the Church does not admit societies or emblems manifestly inimical to the Catholic religion at Catholic funerals.<sup>14</sup> Those who accompany the funeral must obey the orders of the pastor concerning the arrangement of the funeral cortège, with due regard, of course, to rights of precedence.<sup>15</sup>

The Code also provides for a *portio paroeccialis*, or pastor's share, to be given to the deceased's own pastor if the funeral is not held in the parish church, unless the body could not have conveniently been brought to the deceased's own parish church, or unless a particular law should rule otherwise.<sup>16</sup> This would be a matter for diocesan statutes.

The Code also rules that the local Ordinaries shall, each for his own territory, draw up a list of funeral fees, if none such exists, with the advice of the cathedral chapter (our

<sup>14</sup> Can. 1233, § 2.

<sup>15</sup> Can. 1233, § 3.

<sup>16</sup> Can. 1236, § 1.

diocesan consultors), and, if deemed advisable, with the coöperation of the rural deans and pastors of the episcopal city. The stole fees should be moderate and so determined that every occasion for quarrel and scandal is removed. It is permissible to arrange several classes of funeral services,<sup>17</sup>—which, in our humble opinion, savors of the class system so unpopular in a democratic country. But the poor shall by all means be given a decent funeral and burial free of charge.<sup>18</sup>

The laws concerning the interdict, desecration, and reconciliation of churches also apply to cemeteries; but though a cemetery may be desecrated, the adjoining church is not.<sup>19</sup>

## Article IV.

### *American Civil Church Law*

#### 1. *Appointment and Removal of Pastors.*

Courts have no power to control the action of

<sup>17</sup> Can. 1234.

<sup>18</sup> Can. 1235, § 2.

<sup>19</sup> Can. 1207; can. 1172, § 2.

a religious society in the employment and payment of a minister. This is the rule in our country.<sup>1</sup> Consequently it has been decided in more than one case: "By the laws and customs of the Roman Catholic Church in the U. S. a priest is liable to be removed from the charge of a congregation at the pleasure of his bishop. . . . The pastoral relation is neither created nor dissolved by agreement between the priest and the congregation; the bishop appoints or removes the shepherd as he deems for the priest's good or for the interest of the flock. Removal is the exercise of episcopal authority according to the bishop's judgment."<sup>2</sup> We can find no fault with this decision. Only it must be remembered that the bishop has not absolute power, but only as much as the Code grants him. Therefore, the statement that the bishop can now remove a pastor without trial or at

<sup>1</sup> C. Z. Lincoln, *The Civil Law and the Church*, 1916, page 156.

<sup>2</sup> *Stack v. O'Hara*, 98 Pa. 213 (Lincoln, *l. c.*, page 679).—It is different with non-Catholic ministers, who enter upon their service to be rendered to a congregation by means of a contract, the congregation extending a call, the minister accepting it; Karl Zollmann, *American Civil Church Law*, 1917, page 336 f.

his mere pleasure, must be judged according to the Code. But the State will not interfere in the lawful exercise of episcopal rights. Therefore, "no suit can be maintained by a priest of a Catholic Church against his bishop for removing him from his office of priest, the civil courts in such cases having no authority to inquire as to the rightfulness of ecclesiastical decisions."<sup>3</sup>

Consequently also it was held that no action lies in favor of a Roman Catholic priest against his bishop for salary or support during a period in which the bishop refused to assign him a charge.<sup>4</sup>

Yet the civil courts decided in favor of a pastor who had been removed without any accusation or hearing. As priest he received no stated salary, but was entitled to the pews, Sunday collections, subscriptions, and offerings. His profession and these sources of income were deemed to be property of which he could not be deprived by the summary order of the bishop without any opportunity to be heard. It was held that his re-

<sup>3</sup> *O'Donovan v. Chatard*, 97 Ind. 421 (Lincoln, *l. c.*, page 681).

<sup>4</sup> *Twigg v. Sheehan*, 104 Pa. 493 (Lincoln, *l. c.*, page 681).



moval as pastor of the church, and also the prohibition and disfranchisement forbidding him to exercise any priestly functions in Williamsport, were unlawful."<sup>5</sup>

We may be permitted to make a remark on this decision. The court was wrong, according to canon law, in saying that said income was the property of the priest; it is not his property in the juridical sense, the ownership being vested in either the corporation or the bishop or the fabric, the priest being only the usufructuary thereof and entitled to a decent support, as long as he was not deposed. But the assertion that the removal was unlawful because the priest had not been either accused or heard rests on the axiom: "*Nemo malus nisi probetur.*" *Videant consules!* Let them keep the law, and the law will defend them. The ruling of the court was at least equitable.

The manner in which the civil courts regard the *relation of priest to bishop* is thus described in general terms:<sup>6</sup> "Attempts have been made by priests to hold their bishop

<sup>5</sup> O'Hara v. Stack, 90 Pa. St. 477 (Lincoln, *l. c.*, page 680f.).

<sup>6</sup> See Zollmann, *l. c.*, page 351 f.

for their salary. These attempts have met with no favor in the courts. It has been held that the relation between bishop and priest is not that of hirer and hired, but rather that of superior and inferior agents of the same church. . . . Since there is no contract between priest and bishop after the priest has been assigned to a charge, there can be none before such assignment. Whatever duty a bishop may have to appoint a priest to some charge is a religious duty only. For its performance or non-performance he is answerable only *in foro conscientiae* or to his ecclesiastical superior. It is a matter in which the ecclesiastical discretion of the bishop is and must be the determining factor. In the exercise of that discretion he is answerable only to the laws of the Church. . . . The priest, so far as the courts are concerned, can lay down his office and its duties at pleasure. For doing so he can be visited only with ecclesiastical censure and such punishment as the church canons prescribe. The priest, so far as the courts are concerned, is thus completely without remedy as against his bishop. The bishop may appoint him or not in his discretion. He

may after he has appointed him assign him to another charge. He may even enjoin him from exercising priestly functions and remove him absolutely without trial, and the court will be in no position to afford him any relief." This last named term "without trial" must be understood in the light of the remark made above. For the bishop can validly and licitly remove a priest from office only according to the terms of the ecclesiastical law.

The bishop may, then, transfer a priest from one parish to another without being afraid that he is acting against the civil law or that the civil courts will interfere.<sup>7</sup>

2. *Functions of pastors and their relation to their congregation.* It is evident that, since the pastor is responsible only to the bishop for his office, the parishioners have only such rights towards the pastor as the law of the Church grants them. "While a member has the undoubted right to complain of the minister to his ecclesiastical superior, such complaint must be made in good faith. Similarly a member may make inquiry con-

<sup>7</sup> See *Bonacum v. Murphy*, 71 Neb. 463 (Lincoln, l. c., page 660 f.).

cerning his minister and, if he receives a libelous reply and publishes the same in good faith, he will be protected. The clergyman, according to the rules of his church, will sometimes be called upon to pronounce the sentence of excommunication on certain of his members. Such act if done in good faith will not lay the minister open to an action of slander, however much he may have to hurt the feelings of the excommunicated person. . . . However, if the clergyman goes farther and advises his people to shun the excommunicated person in business transactions, and not to come near to his home or employ him as a physician, he steps outside of his privilege and will be liable to an action of slander or libel.”<sup>8</sup> The case in question was as follows: “A Roman Catholic priest told his congregation from the pulpit that a civil marriage by a physician who was divorced from his first wife excommunicated him from the church; that it should debar him from employment as a physician by the members of the parish under penalty of loss of the ministrations and sacraments of the Church in case of their ill-

<sup>8</sup> See Zollmann, *l. c.*, page 349 f.

ness, and that anyone needing the priest should not send for him when the physician was present, as he did not wish to be under the same roof. It was held that the words might properly be submitted to a jury as actionable *per se*, without an averment of special damage.”<sup>9</sup> Now this priest overstepped the limits of his office in a most flagrant manner, because neither the former nor much less the present law gave him the right to declare the doctor a *vitandus*.<sup>10</sup> He ought to have announced the sentence in the name of the bishop, because no priest has any right to excommunicate a member, unless this penalty is expressly stated in law, and the lawful superior expressly commands the declaration of the sentence.<sup>11</sup>

“In Catholic meetings it is appropriate that the priest, as the presiding officer of the meeting, should preserve order and rebuke all violations of it.”<sup>12</sup>

*Preserving order and removing disturbers* has always been safeguarded by our laws or

<sup>9</sup> *Morasse v. Brochu*, 151 Mass. 567 (Lincoln, l. c., page 678 f.).

<sup>10</sup> See can. 2258; can. 2267.

<sup>11</sup> Can. 2223, § 4.

<sup>12</sup> *Wall v. Lee*, 34 N. Y. 141 (Lincoln, l. c., 680).

statutes. A religious society may prescribe such rules as it may think proper for preserving order when met for public worship, and may use the necessary force to remove a person who is disturbing the society by willful violation of a rule.<sup>13</sup> A church warden may take the hat off the head of one who sits covered during divine service. Such act does not constitute an assault.<sup>14</sup>

What the law considers a *disturbance of divine worship* is thus described in one case: "To constitute the offence there must be a congregation assembled for religious worship, and that congregation, so assembled, must be disturbed, that is, agitated, aroused from a state of repose, molested, interrupted, hindered, perplexed, disquieted, or turned aside or diverted from the object for which they are assembled; and the act which causes the disturbance must be willfully done."<sup>15</sup>

*"Religious worship* consists in the performance of all the external acts and the observ-

<sup>13</sup> *McLain v. Matlock*, 7 Ind. 535 (Lincoln, l. c., page 654).

<sup>14</sup> *Hall v. Planner*, 1 Levinz (England) 196 (Lincoln, l. c., page 653 f.).

<sup>15</sup> *Richardson v. State*, 5 Texas Ct. of App. 470 (Lincoln, l. c., page 202), and *passim*.



ance of all the ordinances and ceremonies which are engaged in with the sole purpose of honoring God." In popular usage, "religious service" and "divine service" are synonymous terms. Proof that a congregation was assembled at a Methodist Episcopal church, at which there was preaching and taking up of a collection, is sufficient to show that there was a congregation of persons lawfully assembled for divine service. But "if the purpose of the meeting be solely for instruction in the art of singing, although confined to the singing of sacred songs, this would not be an assemblage for religious worship."<sup>16</sup>

3. *The parishioners.* In order that a parish be recognized by civil law as a Catholic parish it must be acknowledged as such by the lawful authority of the Catholic Church. "*Congregations* may hold Catholic doctrines just as other denominations hold Catholic doctrines, but ecclesiastically and in sight of the Roman Catholic Church, they have no existence; they are not recognized by the papal

<sup>16</sup> Chase v. Cheney, 58 Ill. 509; McDaniel v. State, 5 Ga. App. 831; Adair v. State, 134 Ala. 183 (Lincoln, l. c., page 652 f.).

authority. The congregation cannot divorce itself from the church, or form an independent organization and retain the ownership of the property." <sup>17</sup>

As to *individuals*, the law does not force anyone to be or remain a Catholic. "No power save that of the Church can rightfully declare who is a Catholic. The question is purely one of church government and discipline, and must be determined by the proper ecclesiastical authority. The decision of the church authorities is final." <sup>18</sup>

Hence "the courts cannot compel an individual to attend worship in any place, nor to remain connected with any church, nor to receive anyone as his pastor. These are matters which are relegated to the domain of the individual conscience, and over which neither legislature nor court can exercise any control. Religious freedom means absolute personal independence." <sup>19</sup> This decision is logical only if we recall the fact that in our country

<sup>17</sup> *Dochkus v. Lithuanian Benefit Society of St. Anthony*, 206 Pa. St. 25 (Lincoln, *l. c.*, p. 669).

<sup>18</sup> *Dwenger v. Gary*, 113 Ind. 106 (Lincoln, *l. c.*, page 667).

<sup>19</sup> *Feizel v. First German Society of M. E. Church*, 9 Kan. 592 (Lincoln, *l. c.*, p. 655).

there is separation of Church and State and no State religion is recognized. This may appear heretical to such as are still under the influence of European conditions, but we have to reckon with facts.

With regard to the *support of the pastor or priest* it has been the practice of our courts to hold "that it is the duty of a religious denomination to provide a support for its teacher," but only as long as he really performs his duties and has not disqualified himself by suspension or deposition from office.<sup>20</sup> But it has also been held that the members of the local society were not individually liable for the pastor's salary.<sup>21</sup> Neither is the bishop liable for it.<sup>22</sup>

There is a noteworthy decision respecting *tariff and salary prescribed by the bishop of the diocese*. It states that this tariff or tax may be binding on the conscience of those immediately affected by it, but resort cannot be had to courts of justice to enforce compli-

<sup>20</sup> *Twigg v. Sheehan*, 101 Pa. St. 363 (Lincoln, *l. c.*, page 399); *Zollmann, l. c.*, p. 346.

<sup>21</sup> *Riffe v. Proctor*, 99 Mo. App. 601 (Lincoln, *l. c.*, page 13).

<sup>22</sup> *Wardens of the church of St. Louis v. Blanc*, 8 Rob. (La.) 51 (Lincoln, *l. c.*, p. 661).

ance. And the reason for refusing enforcement by the courts was that the people (parishioners) had no representation in that branch of government.<sup>23</sup> This according to the old rule, "No taxation without representation." It also holds concerning other contributions.

Although there is separation of Church and State, and the latter does not compel anyone to be a member of any particular church, yet the law protects the *authority of the Church over its members*. "Churches have authority to deal with their members for immoral or scandalous conduct; and for that purpose, to hear complaints, to take evidence, and to decide, and, upon conviction, to administer proper punishment by way of rebuke, censure, suspension, and excommunication. To this jurisdiction, every member, by entering into the church covenant, submits and is bound by his consent. The proceedings of the Church are quasi-judicial, and therefore those who complain, or give testimony, or act and vote, or pronounce the result, orally or in writing,

<sup>23</sup> Church of St. Francis, Pointe Coupee v. Martin, 4 Rob. (La.) 62.

acting in good faith, and within the scope of the authority conferred by this limited jurisdiction, and not falsely or colorably, making such proceedings a pretense for covering an intended scandal, are protected by law.”<sup>24</sup>

4. *The church edifice.* “A church edifice is understood to be a building in which the people assemble for the worship of God and for the administration of such offices and services as pertain to that worship.” As such it is *not liable to be taken in execution* for the debts of such society.<sup>25</sup>

“The house of worship may be *removed* from one lot to another, or from one village to another, without an application to the court. *Pewholders* have no right to object to such removal.”<sup>26</sup>

Concerning *taxation* or exemption therefrom, the laws of the different States are by no

<sup>24</sup> *Farnsworth v. Storrs*, 5 Cush, (Mass.) 412 (Lincoln, *l. c.*, page 109).

<sup>25</sup> *Re St. Louis Inst. of Christian Science*, 27 Mo. App. 633; *Bigelow v. Congregational Society*, Middletown, 11, Vt. 283 (Lincoln, *l. c.*, page 119).

<sup>26</sup> *Matter of the Second Baptist Society*, Canaan, N. Y., 20 How. Pr. (N. Y.). 324 (Lincoln, *l. c.*, p. 535).

means uniform, nor does the practice of the States seem to have been uniform. "In considering the subject of tax exemption, says Zollman,<sup>27</sup> taxes must not be confounded with special assessments. Special assessments are not taxes within the constitutional provisions. They are payments for special benefits received, while taxes are burdens, charges or impositions." Thus it was held that the property of a religious corporation is not exempt from assessment for local improvements.<sup>28</sup>

5. Concerning *bells*, the following decisions are of some importance: Bequests for the purchase and upkeep of bells for the benefit of a church which was incorporated are sustained.<sup>29</sup> The ringing of bells may be restrained if it causes public or private nuisance, except as a summons to religious worship.<sup>30</sup> But the custodian of the church, whose duty

<sup>27</sup> *American Civil Church Law*, pp. 250 f.

<sup>28</sup> *Harlem Presbyterian Church v. N. Y.*, 5 Hun. (N. Y.) 442 (Lincoln, p. 613).

<sup>29</sup> *Eastman's Estate*, 60 Cal. 380 (Lincoln, p. 39); *Turner v. Ogden*, 1 Cox (Lincoln, p. 80).

<sup>30</sup> *Leete v. Pilgrim Congregational Society*, 14 Mo. App. 590; *Harrison v. St. Mark's Church*, 12 Phila. (Pa.) 259 (Lincoln, p. 40).



it was to ring the bell, was not liable for maintaining a nuisance.<sup>31</sup>

6. With regard to *pews* it has more than once been decided that the pewholder acquires only a right of occupancy for worship in connection with the services prescribed by the rules of the church. He does not acquire an absolute title, but his interest is subordinate to the general right of the corporation to alter, repair, rebuild, or sell the edifice.<sup>32</sup> The same rule is and has been applied to Catholic churches. And the right to rent the seats to the pewholder belongs to the priests and not to the trustees.<sup>33</sup> Hence a mandamus against the trustees of a society is not the proper remedy for a pewholder to recover possession of his pew.<sup>34</sup>

7. The attitude of our States toward *Catholic cemeteries and burials* has been in conformity with the laws of the Church. "The

<sup>31</sup> Rogers v. Elliott, 146 Mass. 349 (Lincoln, l. c.).

<sup>32</sup> Vorhees v. Presbyterian Church, 8 Barb. (N. Y.) 135, etc. (Lincoln, pp. 450 ff.).

<sup>33</sup> Aylward v. O'Brien, 160 Mass. 118; Smith v. Bonhoof, 2 Mich. 15 (Lincoln, p. 463 f.).

<sup>34</sup> Commonwealth v. Rosseter, 2 Bin. (Pa.) 360 (Lincoln, pp. 457, 460).

interment of the dead is a matter which, within limits, may be with entire propriety brought within ecclesiastical jurisdiction. Such ecclesiastical jurisdiction cannot restrict the police power of the State, but it may prescribe rules for the government of a cemetery, where those in interest place the cemetery under its authority. In exercising jurisdiction over burial places the ecclesiastical authorities do not, unless they transcend their jurisdiction, usurp police powers, nor determine questions affecting property rights. A religious organization in assuming control of a cemetery does not assume jurisdiction of secular matters, and, therefore, does not wander outside of its domain into the domain of the civil law. It does not exceed its jurisdiction in assuming to establish rules for the interment of the dead, unless those rules contravene some rule or principle of jurisprudence. . . . After such rules are established, the persons acquiring the use of burial lots or the right of burial therein take the same, subject to such rules.”<sup>35</sup>

<sup>35</sup> *Dwenger v. Geary*, 113 Ind. 106 (Lincoln, p. 60).

One who buys the privilege of burying his dead kinsmen or friends in a cemetery, acquires no general right of property. He acquires only the right to bury the dead, for he may not use the ground for any other purpose than such as is connected with the right of sepulture. Beyond this his title does not extend. He does not acquire, in the strict sense, an ownership of the ground; all that he does acquire is a right to use the ground as a burial place.”<sup>36</sup> Therefore the Church has also the right to exclude from burial in Catholic cemeteries, or in consecrated ground, the bodies of those who were not Catholics, or who were members of the Masonic fraternity. It was held that this right to burial therein was not secured by a paper acknowledging the receipt of money specified as being the purchase money of the plot. Applicants for burial plots in Catholic cemeteries are supposed to know the regulations of the Church concerning burials, such as the *exclusion of non-Catholics and Freemasons*.<sup>37</sup>

<sup>36</sup> *Ibid.* (Lincoln, p. 62), *et saepius*.

<sup>37</sup> People *ex rel.* Coppers v. Trustees, St. Patrick's Cath. Ch. (Lincoln, p. 668).

The same was decided in case of *suicide*. "A person who obtained a burial lot in the cemetery sought to bury therein the body of his son, who had committed suicide. Such burial was resisted by the church authorities, who brought this action to restrain the lot-owner from such use of the lot contrary to the rules of the Church. The church authorities decided that the person whose burial was sought was not a Catholic, and not entitled to burial in the cemetery, and the court held this decision final and conclusive. The power of making rules regulating the use of the cemetery was lodged in the bishop of the diocese of Fort Wayne, and the pastor of St. Mary's Church." <sup>38</sup>

Concerning *exhumation* or disinterment there is at least a negative decision which sanctions the law of the Church. An interment having been made in the defendant's cemetery at Cypress Hills, friends of the deceased proposed to disinter the remains for burial in another cemetery. The application was refused by the society upon the ground that such disinterment was forbidden by the

<sup>38</sup> *Dwenger v. Geary*, 113 Ind. 106 (Lincoln, p. 668 f.).

Jewish law. The question of disinterring remains must, in the absence of a positive rule of the society, be determined by the court. In this case a judgment was rendered directing the removal of the remains.<sup>39</sup>

The purchaser of a lot in a church cemetery acquires thereby a *right of access to the lot*, and the church authorities cannot obstruct an avenue as laid down on the cemetery map, which leads to the lot or is convenient for the purpose of access thereto. Such an avenue becomes a servitude, which cannot be disturbed.<sup>40</sup>

Concerning *taxation* of cemetery ground the following bears on it: "Land embracing about forty acres was conveyed to the bishop for a burial ground. One acre was used for the cemetery and the other was used for farm lands. It was held that the part not actually used for cemetery purposes was subject to taxation."<sup>41</sup>

However, States and cities have certain

<sup>39</sup> *Cohen v. Congregation Shearith Israel*, 114 App. Div. (N. Y.) 117 (Lincoln, p. 59 f.).

<sup>40</sup> *Burke v. Wall*, 29 La. Ann. 38 (Lincoln, p. 58).

<sup>41</sup> *Mulroy v. Churchman*, 52 Ia. 238 (Lincoln, p. 666).

powers with regard to forbidding interments in certain localities. Thus "the city of New York under the act of 1813 (2 R. L. 445, s. 267) had power to enact the by-law of 1823, prohibiting interments in a certain part of the city under prescribed penalties. Interments were afterwards made in the proscribed area by persons having a right of interment under grants of land for cemetery purposes. The by-law was valid as to these interments, and the act under which it was passed was not void as impairing the obligation of a contract. The by-law was valid as a police regulation." <sup>42</sup>

<sup>42</sup> *Coates v. New York*, 7 Cow. (N. Y.) 585 (Lincoln, p. 63).





## INDEX

- Abbesses, 41.  
 Abbots, 34, 86.  
 Administration of parishes,  
     209 sqq.  
 Adrian IV, 41.  
 Advowson, 20, 41, 48, 94, 108,  
     140, 149 sq., 169, 202.  
 Agde, Synod of, 24 sq.  
 Alaska, 62.  
 Alexander II, 31.  
 Alexander III, 39.  
 Alexander IV, 41, 42.  
 Alienation, Of church property,  
     18, 25, 107, 130, 136, 258,  
     264; Of pensions, 222 sqq.  
 Apostles, 2.  
 Apostolic delegate, 151.  
 *Applicatio Missae pro populo*,  
     230.  
 Apostolic administrators, 61.  
 Archdeacon, 237.  
 Architecture, Ecclesiastical,  
     286.  
 Archpriest, 22 sq.  
 Assistant pastors, 163 sqq.,  
     235 sqq.  
 Athanasius, St., 3.  
 Augustine, St., 4.  
 Authority, Competent for es-  
     tablishing a parish, 85 sq.,  
     96; For uniting parishes,  
     143 sqq.; For dividing par-  
     ishes, 156 sqq.; For making  
     transfer of parishes, 200 sq.;  
     Of Church protected by  
     State, 317 sq.  
 Automobiles, 162 sq.  
 Avarice, 22.  
 Avranches, Synod of, 237.  
 Baltimore, First Provincial  
     Council of, 49; Church  
     property in diocese of, 51  
     sq.; St. John's parish at, 77;  
     Third Plenary Council of,  
     83 sq., 187, 260 sq.; Second  
     Plenary Council of, 186;  
     Eighth Provincial Council  
     of, 277.  
 Baptism, Right of conferring,  
     24.  
 Begging, 282 sqq.  
 Bells, 294, 319 sq.  
 Benedict, St., 32.  
 Benefices, Ecclesiastical, 9, 18,  
     37 sq.; *In commendam*, 48  
     sq.; Parishes as, 85; Condi-  
     tions laid down by founder,  
     94; The parish as a, 110;  
     Union of, 137 sqq.; Acces-  
     sory, 141; Cumulation of,  
     149; Reserved, 150; "Re-  
     ligious," 183 sqq.; Transfer  
     of, 199 sqq.; Transforma-  
     tion of, 202 sq.; Suppression,  
     203 sq.

- Beneficium*, 9; see Benefices.  
 Bination, 237.  
 Bishop, 6 sq., 9, 19, 21, 29, 56, 59 sq., 83, 88, 89, 91, 93, 94, 111, 113, 127, 128, 130, 131, 132, 144, 145, 146, 147, 149, 151, 154, 157 sq., 159, 165, 167, 168, 170, 173, 177, 179, 184, 186, 188, 189, 191, 192, 199, 200, 202, 203, 206, 207, 210, 211, 215, 216, 221, 222, 224, 225, 232, 235, 237, 239, 248, 259, 260, 261, 263, 268, 269, 271, 275, 276, 277, 281, 285, 288, 291, 294, 296, 297, 299, 300, 301, 303, 307 sqq.  
 Boniface, St., 15.  
 Books, Parish, 234.  
 Boundaries, Parish, 65, 66 sq., 70, 81, 83, 92, 139, 142, 146.  
 Budget, Parochial, 88.  
 Buildings, Sacred, 285 sqq.  
 Burial, Right of, 25, 298 sq., 320 sqq.  
 California, 68 sqq.  
 Canada, Parishes in, 48 sq.; Assistant pastors in, 240.  
 Cardinals not allowed to erect parishes within their titular churches, 85 sq.  
 Carpentras, Synod of, 7 sq.  
 Carroll, John, 51, 53, 75, 77.  
 Cathedral, 5, 8, 146, 149, 267 sqq., 280 sq.  
 Cathedraic, 9 sq., 276 sqq.  
 Celibacy 37.  
 Cemeteries, 291, 293, 297 sqq., 320 sqq.  
 Censures, 232.  
 Centralization, 165.  
 Chalcedon, Council of, 4.  
 Changes in condition of parishes, 136 sqq.  
 Chapels, 4.  
 Chaplains, Military, 79.  
 Chapter, 192, 197 sq.  
 Charity, 94.  
 Charlemagne, 27, 31.  
 Charles Martel, 14.  
*Chorepiscopi*, 3.  
 Church of Christ a mystic body which appears and acts like a body politic, 102 sq.  
 Church property, Origin of, 7, 11 sq., 256 sqq.; Vicissitudes of, 14 sqq.; Spoliation of, 15; Laws restricting conveyance, 15 sq.; Mortgaging of, 16; Leasing of, 17; Pastor's right of administering, 25; Investment of, 91; Holder of, 173; Administration of, 258 sqq.; Upkeep and repair of, 266 sqq.  
 Civil law, American, Concerning parishes, 112 sqq., 204 sqq., 305 sqq.  
 Clergy, Material resources of, 11.  
 Clermont, Synod of, 39.  
 Coadjutor bishops, 60 sq., 132.  
 Code of Canon Law, 2, 5, 74, 83, 84, 85, 86, 88, 89, 110, 111, 113, 150, 151, 157, 158, 159, 162, 163, 166, 167, 170, 172, 174, 175, 177, 184, 187, 198, 202, 214, 215, 231, 232,

- 234, 240, 241, 252, 257, 260, 262, 269, 272, 273, 275, 276, 278, 282, 283, 286, 287, 291, 293, 295, 304, 307.  
*Collatio libera*, 20 sq., 42.  
 Collections, 87 sq., 219.  
*Collegia*, 98 sq.  
 Collegiate churches, 149.  
 Concordats, 68 sq., 72, 143 sq., 270.  
*Concursus*, 192.  
 Conditions of a pious foundation, 95 sqq.  
 Consecration of a church, 287 sq., 289.  
 Constitution of the U. S., 52 sq.  
 Consultors, Diocesan, 170  
 Contributions, Parish, 9 sq., 11, 61, 87, 273 sqq.  
 Cornerstone laying of a church, 288.  
 Corporation aggregate, 57.  
 Corporation sole, 55 sq., 109, 115.  
 Corporations, Ecclesiastical, in charge of parishes, 45 sq.; Corporate rights, 98 sqq., 109; Civil laws affecting, 115 sqq.  
 Corpus Christi, Diocese of, 68, 78 sq.  
 Corradus, Pyrrhus, 167  
 Country parishes, 2 sqq., 7, 8, 23, 67 sq.  
 County, 6.  
 Cumulation of benefices, 149.  
 Curates, 163 sqq., 235 sqq.  
 Deacons, 19 sq.  
 Deans, Rural, 168, 235.  
 Debts, Division of in case of dismembration of parishes, 172 sqq.  
 Decision of Nov. 10, 1922, 63 sqq.  
 Decretals, 31, 39, 70, 175, 177.  
*Decretum Gratiani*, 39, 70.  
 Dedication of a church, 287 sqq.  
 Desecration of a church, 290 sq.  
*Dimes*, 48.  
 Diocese, 7, 29.  
 Dismembration of parishes, 30 sqq.; Formalities required for, 167 sqq.  
 Distance as a reason for dividing a parish, 160 sq.  
 Division of parishes, 29 sqq., 155 sqq.; Canonical reasons for, 158 sqq.; Recourse from a decree of, 178 sqq.  
 Domicile, 245 sq.  
*Domus religiosa*, 188 sqq.  
 Donations, 11.  
 "Door dime," 293.  
 Dubuis, C. M., 132.  
 Endowment of parishes, 7 sqq., 86 sqq., 92, 171 sq., 202, 274.  
 Engelberg, 41.  
 Eusebius, 3.  
*Excurrentes*, 142 sq.  
 Exemption, Privilege of, 16 sq., 92 sq., 150, 301.  
 Exhumation of corpses, 298, 323 sq.  
 Fagnani, 184.  
 Fee simple tenure of church

- property, 57 sq., 109, 127, 131.  
 Florissant, Mo., 50.  
 Formalities for erecting a parish, 84 sqq.; Legal, 91 sqq.; For uniting parishes, 152 sqq.; For a decree of division, 181 sqq.; For transfer of parishes, 201 sq.  
 Founders of benefices or parishers, 94 sqq.  
 Franciscans, 48, 50 sq.  
 Functions, Pastoral, 229 sqq.  
 Funeral fees, 304 sq.
- Gallagher, N. A., 132.  
 Gelasius I, 29.  
 Greek-Ruthenians in U. S., 80.  
 Gregory the Great, St., 32 sq.  
 Gregory VII, 38.  
 Gregory IX, 41.  
 Gregory XIII, 45.
- Hincmar of Rheims, 21.  
 Hospitals, 46, 96, 149, 174, 301.  
 House collections, 87.
- Immigration, 74.  
*Immunitatis Privilegia*, 16 sq.  
 Incorporation of parishes with monasteries, 39 sqq., 43, 80 sq., 189 sq.  
 Indians, 71.  
 Installation of a pastor, 235.  
 Institute, 105.  
*Institutio corporalis*, 235.  
 Investiture of religious as pastors, 190 sqq.
- Investment of parish funds, 90, 194 sq.  
 Irremovable, see Pastors, Parishes.  
*Ius asyli*, 293.  
*Ius patronatus*, 20 sq., 41, 48, 94, 149, 169, 177.
- Jesuits, 48.  
 Justinian, Code of, 103 sq.
- Kenrick, F. P., 52.
- Lateran Council, Third, 46.  
 Laval, Msgr., 48.  
 Lay investiture, 21, 37.  
 Lay trustees, 56, 57.  
 Legacies, 11.  
 Leo XIII, 184.  
 Liability of members of religious or charitable corporations, 125 sqq.  
 London, Council of, 38.  
 Loretto, Cal., 51.  
 Louis the Debonaire, 11.
- Macon, Council of, 12.  
*Mansus*, 11.  
 Mariotis, 3.  
 "Marks of honor" due to the mother church from the daughter churches, 177 sq.  
 Marriages, Assistance at, 50, 93.  
 Mass Stipends, 88; Reduction of obligations, 138, 145.  
 "Maxima cura," 240.  
 Melfi, Council of, 37.  
*Mensa episcopalis*, 148, 277, 278, 279.

- Metropolitans not allowed to interfere with their suffragans in establishing parishes, 86.
- Mexico, 68, 69, 70.
- Militiae*, 149.
- Minor orders, 237.
- Missions, 141.
- Missions, California, 70 sqq.
- Missouri, 50, 77, 128.
- Monasteries, 9 sq., 16.
- Money, How much required for the endowment of a parish, 89, 90.
- Monks as parish priests, 31 sqq.
- Monterey, Diocese of, 68, 69.
- Mortmain, 54 sq.
- Music, Sacred, 290.
- Nantes, Synod of, 26.
- "National parishes," 67 sqq., 97, 166, 184, 243 sqq.
- Nepotism, 20, 22.
- New Orleans, 49, 278.
- New York, Statutes referring to parish corporations, 117 sqq.
- Obstacles to church attendance as a cause for dividing a parish, 161 sq.
- Offerings of the faithful, 11, 87 sq.
- Oratories, 4 sq., 6, 23, 24, 25.
- Ordination, 19.
- Organ, 295.
- Origin of parishes, 2 sqq.
- Over-taxation, 281.
- Ownership, Right of, 99 sq.
- Pagus*, 6.
- Paris, Reform Council of, 26 sq.; Congestion of parishes in, 163.
- Parish church, The, 255 sqq.; Fabric of, 256 sqq.; Edifice, 285 sqq.; Desecration of, 290 sq.; Reconciliation, 291 sq.
- Parishes: Derivation of the term, 1; Definition of, 2; Origin of, 2 sqq.; Characteristics of ancient, 6 sqq.; Endowment of, 7 sqq.; Division of, 29 sqq.; Religious in charge of, 31 sqq.; *In commendam*, 48 sq.; In Canada, 48 sq.; In the U. S., 49 sqq.; Establishment of, 59 sqq.; Different kinds of, 62 sqq.; "National," 67 sqq.; Family and personal, 79 sq.; Consistorial, 80; "Religious," 80 sqq.; Removable and irremovable, 82 sqq.; Erection of, 84 sqq.; As corporations, 102 sqq.; American civil law in regard to, 112 sqq.; Union of, 137 sqq.; Division of, 155 sqq.; Transfer of, 199 sqq.; Transformation of, 202 sq.; Suppression of, 203 sq.; Civil law concerning, 204 sqq.; Administration of, 209 sqq.
- Parishioners, Who are, 242 sqq.; Duties of, 26 sqq., 252 sqq.; Rights of, 107 sq., 248 sqq.; Must be heard if parishes are to be united, 154,



- 169; Excessive number of, a cause for dividing a parish, 163 sqq.; Have no right of presentation or election of pastors in U. S., 212; In civil law, 314 sqq.
- Pastors, Appointment of, 19 sqq.; And parishioners, 22 sqq.; Rights of, 24 sqq.; Functions of in 9th century, 27 sq.; Religious as, 80 sqq.; Removable and irremovable, 82 sqq.; To be heard in case of division or dismembration of parishes, 169; Religious as, 193 sqq.; Appointment of, 209 sqq.; Removal of Removable, 223 sqq.; Irremovable, 226; Functions of, 229 sqq.; American civil law concerning, 305 sqq.
- Paul, St., 2.
- Pennsylvania, 54.
- Pensions attached to parish benefices, 216 sqq.
- Persecutions, 103.
- Pew-holders have no right to object to transfer of a church, 205, 318; Title of, 320.
- Pew rent, 87, 219, 270, 274.
- Pews, Church, 294 sq., 320.
- Philadelphia, 52, 54, 75.
- Philippine Islands, 72 sq.
- Pious foundations, 94 sqq., 111.
- Pittsburgh, 54.
- Pius V, 45.
- Pius VI, 163.
- Pius X, 23, 165.
- Pius XI, 286.
- Plate collections, 87 sq., 274.
- Poitiers, Council of, 37.
- Poor, 9 sq., 231, 232, 233.
- Pope, 131, 251.
- Portio congrua*, 44.
- Porto Rico, 72 sq.
- Preach, Pastor's duty to, 25.
- Precariae*, 18, 42; *Verbo Regis*, 17 sq.
- Presbyteri excurrentes*, 2.
- Prescription, 70.
- Presentation, Right of, 20 sq., 42, 211 sq.
- Profession of faith, 235, 253.
- Property rights of churches, 103 sqq.
- Quasi-domicile, 245, 246.
- Quasi-parishes, 62, 83, 89, 243.
- Railroad crossings, 162.
- Real estate, 11.
- Reconciliation of a church, 291 sq.
- Recourse from a decree of division, 178 sqq.
- Regino of Prüm, 28.
- Reiffenstuel, 45.
- Religious, In charge of parishes, 31 sqq., 80 sqq., 183 sqq.; Rights and duties of, 193 sqq.; Burial of, 299.
- Religious liberty in the U. S., 52 sq., 315 sq.
- Reserved benefices, 150, 210.
- Residence, Canonical, 139 sq., 196 sq., 200, 230.

- Resignation of pastors, 224 sqq.  
 Revenues, Sufficient, to be assigned to new parishes, 171 sqq.  
 Rites, Different, 79 sq., 166, 246 sqq.  
 Roads, 161.  
*"Romanos Pontifices,"* 184, 185, 187.  
 Rome, Synod of, 34.  
 Ruthenians in U. S., 80, 247 sq.  
 Sacred concerts, 290.  
 St. Augustine, Fla., 50.  
 St. Charles, Mo., 50.  
 St. Louis, Mo., 50.  
 Ste. Genevieve, Mo., 50.  
 Schism, American civil law concerning, 205 sqq.  
 Schools, Catholic, 115 sq., 165, 253 sq., 270.  
 Seat money, 293.  
 Secularization, 46 sq.  
 Selling chances, 283.  
 Seminaries, 165, 275.  
 Seminary tax, 273 sqq.  
 Siricius, Pope, 31.  
 Spanish parishes in U. S., 68 sq.  
 Stans, 42.  
 State, 16.  
 Stations, 141.  
 Stole fees, 88, 219, 281.  
 Strabo, Walafried, 6.  
*Subsidium caritativum*, 280 sq.  
 Suicide, 323.  
*Sustentatio congrua*, 43, 146.  
 Tametsi, 50.  
 Tarragona, Synod of, 19, 34 sq.  
 Tassilo of Bavaria, 7.  
 Taxes, Episcopal, 9 sq.  
 Teachers, 297.  
 Territorial circumscription, 6.  
 "Territorial parishes," 55, 77, 78, 114.  
 Testament, 11.  
 Texas, 68, 69, 132 sqq.  
 Thomas, St., On tithes, 13.  
 Tithes, 12 sqq., 13, 21, 31, 35 sq., 278, 279.  
 Toledo, Council of, 12.  
 Toulouse, Council of, 10, 30.  
 Transfer, Of church property, 127 sqq.; Of parishes, 199 sqq.; Of pastors, 228 sq.  
 Transformation of parishes, 202 sq.  
 Trent, Council of, 5, 31, 44, 47, 59, 110, 148, 149, 238, 239, 257, 266, 275.  
 Tribur, Synod of, 5.  
 Trustees, Lay, 56 sq., 76, 119 sqq., 124, 125, 169, 234, 254, 257, 260 sqq., 296, 320.  
 Turin, 163.  
 Union of parishes, 137 sqq.; Reasons and formalities required for, 152 sqq.  
*Universitas*, 101, 106.  
 Urban II, 38.  
 Vacancy, Of par.sh, 212 sqq.  
 Vatican Council, 240.

Vicar-general, 60, 151, 157,  
210, 224, 285, 289.

Vicissitudes of church prop-  
erty, 14 sqq.

Virginia, 54.

Westminster, Council of, 279.

West Virginia, 54.

Wills, 11 sq.

Workingmen, Treatment of,  
297.

Zosimus, Pope, 29.



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